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Repository Citation

Kenneth Rigby, *Matrimonial Regimes: Recent Developments*, 60 La. L. Rev. (2000)
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Matrimonial Regimes: Recent Developments

Kenneth Rigby*

This article reviews significant matrimonial regimes decisions rendered since the writer's previous article on recent developments in matrimonial regimes.¹

I. CLASSIFICATION OF THINGS

In that previous article, the writer reviewed the Court of Appeal decision in *Bordes v. Bordes*,² in which the court held that benefits received by Mr. Bordes from the Employees Retirement System of Jefferson Parish as a result of his disability were his separate property, while similar benefits received by him from the Parochial Employees' Retirement System of Louisiana were community property. The writer noted that the Supreme Court had granted a writ of review³ upon the application of Mr. Bordes with respect to the classification of the latter benefits. The Supreme Court, after reviewing the intermediate appellate court jurisprudence and the provisions of the Parochial Retirement Systems statutory provisions, reversed and decreed these benefits to be the separate property of Mr. Bordes.⁴

The court in *Lee v. Lee*⁵ was also faced with the issue of the classification of disability benefit payments, in a case of first impression in Louisiana involving Tier II Disability Annuity Benefits under the Railroad Retirement Act of 1974.⁶ That federal act provides two tiers of benefits to railroad workers. Tier I benefits are equivalent to those the employee would receive if covered by the Social Security Act.⁷ Tier II benefits function like a private pension plan,⁸ with benefits being tied to earnings and career service.⁹ Absent disability, no benefits are paid to an employee until retirement age.¹⁰ To fund both types of benefits, railroad employers and employees are required to pay Tier I and Tier II taxes, which are calculated as a percentage of employee compensation, to the Internal Revenue Service.¹¹

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1. Kenneth Rigby, *Matrimonial Regimes: Recent Developments*, 59 La. L. Rev. 465 (1999).
2. *Bordes v. Bordes*, 707 So. 2d 471 (La. App. 5th Cir. 1998); see Rigby, *supra* note 1, at 478, n.94.
3. *Bordes v. Bordes*, 721 So. 2d 897 (La. 1998).
4. *Bordes v. Bordes*, 730 So. 2d 443 (La. 1999).
5. 727 So. 2d 622 (La. App. 1st Cir. 1998).
6. 45 U.S.C. §§ 231-231v.
7. *Lee*, 727 So. 2d at 626.
8. *Id.* at 625.
9. *Id.*
10. *Id.*
11. *Id.*

Additionally, the Railroad Retirement Account has been funded in part by the Social Security System and general revenue taxes.¹²

Tier I benefits are not contractual; Congress may modify or eliminate them at any time.¹³

Tier II benefits may be distributed as community or marital property in accordance with a court decree of divorce or the terms of any court-approved property settlement incident to any such court order.¹⁴ Tier I benefits may not.¹⁵

The Lees were married in 1959. Mrs. Lee began employment with the Illinois Central Railroad in 1969. The Lees were divorced and their community terminated in 1991. Mrs. Lee became disabled in 1993 and commenced receiving Tier II disability payments in 1994.¹⁶ At the time of trial of the partition proceedings, Mrs. Lee was 57 years of age.¹⁷ In those partition proceedings, the parties stipulated that the Tier I disability annuity being received by Mrs. Lee and her Tier I retirement annuity payments payable to her upon her reaching retirement age were her separate property.¹⁸ They also stipulated¹⁹ that the Tier II disability annuity payments which will be payable to her upon her reaching retirement age were community property to be divided pursuant to a Qualified Domestic Relations Order based on the *Sims v. Sims*²⁰ formula.

At issue in the case was the community or separate classification of the Tier II disability annuity payments being received by Mrs. Lee. These payments commenced as a result of her disability and will continue until she reaches retirement age if she remains disabled.²¹

The court reviewed the provisions of the Railroad Retirement Act and determined that Mrs. Lee would not be receiving those benefits if she were not disabled; that she is required to prove her disability periodically and, if she becomes capable of working, she will no longer receive the disability annuity; that Mrs. Lee had made contributions to the Railroad Retirement Account in the form of taxes deducted from her community earnings; that her disability benefits are tied to her earnings and career service as a railroad employee; that the benefits she receives are not necessarily correlated to the taxes paid by her and on her behalf; that she has no contractual basis for the recovery of those benefits; that her contributions do not have a cash or redemptive value; that those benefits will convert from disability annuity benefits to a normal retirement pension upon her reaching retirement age; and that the Railroad Retirement Act does not provide for

12. *Id.* (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75, 99 S. Ct. 802, 804-05 (1979)).

13. *Lee*, 727 So. 2d at 626.

14. *Id.*

15. *Tarbet v. Tarbet*, 467 N.E.2d 254 (Ohio App. Dist. 1994); *Belt v. Belt*, 398 N.W.2d 737 (N.D. 1987); *Kamel v. Kamel*, 721 S.W.2d 450 (Tex. App.-Tyler 1986).

16. *Lee*, 727 So. 2d at 629.

17. *Id.*

18. *Id.* at 624.

19. *Id.*

20. *Sims v. Sims*, 358 So. 2d 919 (La. 1978).

21. *Lee*, 727 So. 2d at 624-25.

a reduced retirement benefit based on the fact that she is currently collecting disability annuity benefits.²²

Based upon this review and a weighing of all of these factors in the Act, the court concluded that Mrs. Lee's Tier II disability annuity benefits "are more representative of compensation for lost earnings due to inability to work than deferred compensation,"²³ and therefore are her separate property rather than community property.²⁴

*Egan v. Egan*²⁵ involved the classification of worker's compensation benefits payable to a federal employee through the Department of Labor Office of Worker's Compensation Programs (OWCP). Mr. Egan, a drug enforcement agent with the United States Drug Enforcement Agency throughout his marriage, suffered a disabling job-related injury. He was approved by OWCP for worker's compensation benefits and also was approved for civil service disability retirement by the Office of Personnel Management (OPM). Advised that he could not receive both benefits concurrently, he chose to receive worker's compensation benefits from OWCP rather than the disability retirement from OPM "because they paid more than disability benefits."²⁶ The classification of those benefits paid after the termination of the community was at issue in the partition proceedings. A consent judgment was entered recognizing Mrs. Egan's one-half interest in any retirement or disability retirement benefits that Mr. Egan might be entitled to in the future.²⁷ The wife contended that the worker's compensation benefits constitute community property when the injured husband during the marriage makes an election to receive them instead of benefits from a retirement disability fund, which would be community property.²⁸

Distinguishing the Second Circuit case of *Johnson v. Johnson*,²⁹ the court

22. *Id.* at 629.

23. *Id.*

24. *Id.*

25. 729 So. 2d 1143 (La. App. 4th Cir. 1999).

26. *Id.* at 1145.

27. *Id.* at 1144.

28. *Id.*

29. 582 So. 2d 926 (La. App. 2d Cir. 1991). The ground upon which the court distinguished *Johnson v. Johnson* is questionable. The court in *Egan* distinguished *Johnson* by stating that in *Johnson* "the injured employee's right to receive disability benefits was based upon his contributions to the disability fund, which were made from community funds, and were calculated based upon the number of years of service which occurred during the existence of the community." *Egan*, 729 So. 2d at 1144-45. In *Johnson*, the parties were married January 22, 1965. Mr. Johnson actively served the Bastrop Fire Department from January 1, 1956 until May 13, 1977, when he took a year of sick leave starting May 13, 1977. He commenced receiving disability benefits on May 13, 1978 and continued to draw those benefits. The Johnsons were divorced, and their community regime was terminated effective September 17, 1985. The Act under which Mr. Johnson was receiving his disability benefits provided that those benefits continued "until he becomes eligible for retirement," and further required that he be retired after 25 years of service and that thereafter "he shall receive the benefits provided for under the retirement provisions of this Act, if he is eligible therefor." The court held that Mr. Johnson was mandated in 1981, after 25 years of service, to receive retirement benefits, not disability benefits. His failure to formally apply for retirement benefits could not defeat the community interest of Mrs.

stated that the purpose of worker's compensation benefits is to compensate the injured worker for both lost wages and for reduced or lost earning capacity and are analogous to damages due to personal injuries. The court noted that Mr. Egan's election to receive those benefits has in no way diminished his interest in the pension to which he may one day be entitled. Therefore, the court concluded that the benefits received after the termination of the community regime were his separate property.

The opinions of the Supreme Court and Courts of Appeal in these cases, the appellate court decisions the Supreme Court reviews, and the statutory provisions analyzed, as well as other appellate cases, demonstrate that there is no "bright line" that can be followed in classifying these kinds of benefits as community or separate property. In each case, the payment of the benefit is triggered by the disability of the employee. The name assigned to the benefits does not classify them. All agree that the terms and conditions of the plan or statute providing for the benefits must be analyzed. These include the source of the funding of the payments, the service (time of employment) requirements, the conditions under which an employee is entitled to the benefits, the effect of reaching normal retirement age on the benefits being paid, and any other relevant terms or conditions of the plan providing for the benefits. However, the review should have as its goal a determination of the *purpose* of paying the benefits to the employee. In several respects, the right to receive the disability and retirement benefits and the amount of those benefits, respectively, have common requirements. They are both "earned," in whole or in part, during the existence of a legal regime; they usually have minimum employment requirements; and the amount of the benefits are typically calculated by a formula consisting of years of service, highest earnings, and the application of a factor. What basically distinguishes the two is the *purpose* of the payment of the benefits to the employee.³⁰ The terms and conditions of the plan may have to be carefully analyzed in order to determine the purpose of the payments at issue in order to classify them as community or separate property. In a retirement plan, the purpose of the benefits is to provide income during that period of life when employment has normally ended—to supply income for the post-employment era of the employee. On the other hand, the purpose of disability benefits is to supply income during the period of an employee's life when he would normally be employed and earning income, but is not because of disability. The purpose of disability benefits is to substitute for the income that the employee would be

Johnson. Therefore, the court held that the benefits received by Mr. Johnson after termination of the community were retirement benefits and were subject to the community property claim of Mrs. Johnson.

30. The purpose of paying benefits under a retirement plan is different when the benefits are payable because the employee spouse becomes disabled than when the benefits are payable because the employee spouse reaches normal retirement age. When the divorced employee spouse receives benefits because of disability, the benefits are paid in lieu of income that would otherwise be the employee spouse's separate property. Basing the classification of benefits upon the purpose of the payment of the benefits is fair and equitable, and provides ease of administration. When the employee spouse becomes disabled, the benefits replace the working wages he or she can no longer earn.

Bordes v. Bordes, 730 So. 2d 443, 447-48 (La. 1999) (citation omitted).

earning except for the disability. The concept has been denominated "real subrogation" to convey this substitution of disability payments for lost earnings concept.³¹ If the lost earnings would be community, the payments are community. If the lost earnings would be separate property, the payments are separate property.

One helpful inquiry is directed at how the payments dovetail into the payments provided under that plan or another employer plan when the employee reaches normal retirement age. Do the payments terminate and other payments based upon a different formula commence? Do the payments continue but at a different amount? Are the payments unaffected by the employee reaching normal retirement age?

Another useful inquiry involves the requirements for the initiation and continuation of the payments, i.e., medical examinations and reports, lack of gainful employment, reporting of income,³² in order to identify the payments as substitution for income lost due to disability and not some other cause.

*Schlosser v. Behan*³³ involved two pension issues. Mr. Schlosser was a New Orleans police officer who commenced his employment one month before his marriage on February 16, 1968. At the time of his divorce on August 17, 1976, he was a patrolman assigned to the detective bureau. After being suspended for 30 days in 1979, he became a much more dedicated police officer, successfully completing an advance training course and becoming a sergeant in 1985 and a lieutenant in 1989. He retired on August 8, 1993 with 25.6 years of service. The court approved a *Hare v. Hodgins*³⁴ modification of the *Sims v. Sims*³⁵ straight line formula upon a finding that his retirement benefits contained a substantial increment attributable to his personal effort or achievement after termination of the community property regime of the parties.³⁶ The court found that his later promotions were due to meritorious individual effort and were not related to seniority or longevity or cost of living raises.³⁷ Based upon these factual findings, the application of *Hare v. Hodgins* is appropriate. The court noted that an expert's calculation of Mrs. Behan's *Hare* adjusted portion of Mr. Schlosser's retirement benefit of \$2,702.41 a month was \$314.00 (11.62%), and that this calculation was neither questioned nor put at issue.³⁸

On his retirement in 1993, Mr. Schlosser entered the DROP program, working in it for 3 years, leaving police department employment in 1996.³⁹ While he was in DROP, his monthly retirement benefit was deposited in and credited to him in

31. See 1 Katherine S. Spaht & W. Lee Hargrave, *Matrimonial Regimes* § 3.3 in 16 Louisiana Civil Law Treatise (2d ed. 1997).

32. See *Bordes*, 730 So. 2d at 448 for a weighing of some of these factors in determining the classification of the benefits received by Mr. Bordes.

33. 722 So. 2d 1129 (La. App. 5th Cir. 1998), writ denied, 739 So. 2d 791 (La. 1999).

34. *Hare v. Hodgins*, 586 So. 2d 118 (La. 1991).

35. *Sims v. Sims*, 358 So. 2d 919 (La. 1978).

36. *Schlosser*, 722 So. 2d at 1130-31.

37. *Id.* at 1130.

38. *Id.*

39. *Id.*

a DROP account.⁴⁰ After completion of his participation in DROP, he commenced receiving his monthly retirement benefits.⁴¹

The second issue was the participation, if any, of Mrs. Behan in those funds in Schlosser's Deferred Retirement Option Plan (DROP).⁴² The court held that she was excluded from these benefits.⁴³

The writer discussed the operation of DROP and the Supreme Court case of *Bailey v. Bailey*⁴⁴ in a previous *Louisiana Law Review* issue.⁴⁵ Participation in DROP does not affect the amount of retirement benefits; retirement benefits are determined as of the date of retirement and commencement of participation in DROP.⁴⁶ No additional retirement benefits accrue while the retired employee is in the DROP program.⁴⁷ His retirement benefits, which would otherwise be payable to him upon his retirement, are not paid to him but are credited to him in a DROP account during his participation in DROP.⁴⁸ The funds in the DROP account are invested, and the member is credited with his proportionate share of the account's earnings and growth, or losses.⁴⁹ At the termination of his participation in DROP, the employee is eligible to commence receiving his retirement benefits, including both his current retirement benefits and those that have been credited to him during his participation in DROP.⁵⁰ The retirement benefits that have been deposited in the DROP account, together with his current retirement benefits, are paid to him in accordance with the options available to him under the retirement plan.⁵¹ The deposits being credited to him in the DROP account are not a result of his efforts and earnings during his participation in DROP;⁵² they are the result of his

40. *Id.* at 1131.

41. *Id.*

42. *Id.* It is difficult to determine from the opinion the nature of the benefits at issue. However, counsel for Mr. Schlosser advised the writer that the benefits at issue were Mr. Schlosser's retirement benefits that were deposited to his DROP account during his participation in DROP.

43. *Id.*

44. *Bailey v. Bailey*, 708 So. 2d 354 (La. 1998).

45. Rigby, *supra* note 1, at 473.

46. *Id.* at 473 n.61. See also La. R.S. 11:448B (1993).

47. See La. R.S. 11:448A and B (1991).

48. Rigby, *supra* note 1, at 473 n.62. The member is considered to be in a retired status although he continues to work and is paid for his work. *Id.* at 473, nn.59-60. See also La. R.S. 11:448C (1991).

49. Rigby, *supra* note 1 at 473, n.63. See also La. R.S. 11:449 (1991); La. R.S. 11:517 (1991).

50. See La. R.S. 11:450A (1997)

51. Rigby, *supra* note 1, at 473 n.64.

52. The following statement of the trial court in its Reasons for Judgment, approved by the appellate court in *Schlosser*, is simply not correct:

The DROP benefit earned by Mr. Schlosser was not part of his retirement package which yields the monthly retirement benefit, but a separate and voluntary program offered to senior members of the department and solely earned by Mr. Schlosser during his three (3) years in the DROP, having nothing to do with the monthly retirement benefits earned by him through the Municipal Police Officers Pension Plan.

Schlosser v. Behan, 722 So. 2d 1129, 1131 (La. App. 5th Cir. 1998), *writ denied*, 739 So. 2d 791 (La. 1999). On the contrary, the retirement benefits deposited to the credit of Mr. Schlosser in his DROP account during his participation in DROP were *wholly* earned prior to his retirement and were not earned at all during his participation in DROP.

employment and earnings prior to his retirement and prior to his participation in DROP. In *Schlosser*, if the benefits in question were his retirement benefits that were deposited in the DROP account during his 3 year participation in DROP, Mrs. Behan was entitled to the *Hare* adjusted community portion of them, 11.62%, plus the same proportionate part of the gains and less the same proportionate part of losses on them while in the DROP account.

The court in *Schlosser* attempted to distinguish the case of *Bailey v. Bailey*⁵³ on the following grounds:

Primarily because Schlosser did not enter the DROP program until 17 years after termination of the community he shared with Ms. Behan, we cannot say the trial judge erred in excluding Ms. Behan from these benefits. This time element distinguished the instant case from *Bailey v. Bailey*, 708 So. 2d 354 (La. 1998), in which a community existed during part of the time the employee was in DROP.⁵⁴

In *Bailey*, Mr. Bailey retired and entered the DROP program in October, 1993. The Bailey community was terminated effective January 28, 1994. Mr. Bailey completed his DROP employment in 1996. The parties stipulated that the community portion of his regular retirement benefits was 53.65% of those benefits and that Mrs. Bailey was entitled to one-half of that community interest. The supreme court correctly held that Mrs. Bailey was entitled to the same percentage of his DROP account. Mr. Bailey retired prior to the termination of the community, and his retirement was fully earned on the date of retirement, whether he received those retirement benefits commencing on the date of his retirement or his receipt of them was deferred during his participation in the DROP program. The fact that the community existed during part of the time Mr. Bailey was in DROP does not affect either the classification of the retirement benefits or the apportionment of them. The retirement benefits deposited to Mr. Bailey's DROP account, as well as the retirement benefits subsequently received by him, were fully earned and their amount was fixed, as was both the community portion of them and Mrs. Bailey's portion of them, as of the date of Mr. Bailey's retirement. His subsequent participation in the DROP program did not affect any of these facts. The retirement benefits were simply credited to him instead of being paid directly to him during his participation in the DROP program. These benefits, together with his then current retirement benefits, were paid to him after the completion of his participation in the DROP program in 1996, in the manner discussed earlier.

II. CO-MINGLING

In *Granger v. Granger*⁵⁵ the issue was the separate or community classification of a brick home purchased by the Grangers during their marriage. This home was

53. 708 So. 2d 354 (La. 1998).

54. *Schlosser*, 722 So. 2d at 1131.

55. 722 So. 2d 107 (La. App. 3d Cir. 1998).

purchased in part with the proceeds from the sale of the Grangers' previous home and in part from the proceeds of certificates of deposit.⁵⁶ The previous home was conveyed to Mr. Granger by his father in exchange for Mr. Granger's agreement to take \$25,000.00 less in cash owed to him from his mother's succession.⁵⁷ The certificates of deposit were purchased with the balance due him from his mother's succession.⁵⁸ All these funds were first deposited in their joint certificates of deposit and money market accounts and later transferred to their joint checking account, from which two checks were issued to the sellers of the house for the purchase price.⁵⁹ The only community money in this account was the interest earned from the husband's certificates of deposit and a small amount of earnings from the couple's jobs, the amount of which was found by the court to be "minute in comparison to the amount of separate funds in the account."⁶⁰ The wife contended that once the separate funds became indiscriminately mixed with community funds, all the mixed funds became community.

The court correctly held that under these facts the separate funds in the account remained the separate property of the husband.⁶¹ The court also invoked the principle of real subrogation,⁶² stating that funds acquired through the sale of separate property remain separate. This principle has been incorporated into Louisiana Civil Code articles 2338 and 2341.⁶³ Actually, in this case the real subrogation analysis is a three step, or three tier, analysis. The original house was Mr. Granger's separate property, having been acquired by inheritance.⁶⁴ The court treated the house as having been inherited by Mr. Granger, rather than acquired from his father in exchange for the relinquishment of a portion of his rights of inheritance, or rights to succeed.⁶⁵ When that house was sold, the resulting funds were his separate property under the principle of real subrogation.⁶⁶ When those funds were used to purchase the second house, that house was Mr. Granger's separate property, also under the principle of real subrogation.⁶⁷

The court also correctly pointed out that it is not the commingling that results in separate funds being characterized as community funds.⁶⁸ If the community and separate components of the account can be identified, those respective components

56. *Granger*, 722 So. 2d at 109-11.

57. *Id.* at 110.

58. *Id.*

59. *Id.* at 109-10.

60. *Id.* at 111.

61. *Id.* See *McMorris v. McMorris*, 654 So. 2d 742, 745-46 (La. App. 1st Cir. 1995).

62. *Granger*, 722 So. 2d at 110.

63. La. Civ. Code art. 2338 provides, in part: "The community property comprises: . . . property acquired with community things. . . ." La. Civ. Code art. 2341 provides, in part: "The separate property of a spouse is his exclusively. It comprises . . . property acquired by a spouse with separate things. . . ."

64. La. Civ. Code art. 2341 provides, in part: "The separate property of a spouse is his exclusively. It comprises . . . property acquired by a spouse by inheritance. . . ."

65. La. Civ. Code art. 2341, cited *supra* note 63. See also La. Civ. Code art. 888.

66. La. Civ. Code art. 2341.

67. *Id.*

68. *Granger*, 722 So. 2d at 110.

retain their respective community and separate classifications.⁶⁹ It is only when they have been so commingled that the separate funds can no longer be identified or differentiated from the community funds that all funds are characterized as community funds.⁷⁰ When, as in *Granger*, the separate funds used to purchase property can be traced with sufficient certainty, the property purchased with those funds is correctly classified as separate property.

In *Rodrigue v. Rodrigue*,⁷¹ the United States District Court for the Eastern District of Louisiana held that the federal Copyright Act⁷² conflicts with and preempts Louisiana community property law on the issue of whether a husband and wife living under a legal regime of community of acquets and gains are equal co-owners of copyrights obtained by the husband during that regime. Mr. Rodrigue is an artist, and during his 26 year marriage to Mrs. Rodrigue, he created numerous paintings and obtained certificates of copyright for some of them. Mrs. Rodrigue sought an accounting for his use of certain recurring images (the "Blue Dog" and "Jolie Blonde" images) that, after the divorce, continued to be thematically expressed in his paintings. She contended that under Louisiana community property law, the recurring images in the art created during the marriage were community property as products of the "effort, skill, or industry" of her husband,⁷³ and that she was vested under that law with an undivided one-half ownership interest in them.⁷⁴ The copyright law provides that "[c]opyright . . . vests initially in the author."⁷⁵ The court found that these provisions "clash head-on," and that the federal provisions preempt the state ones.⁷⁶ The court found that deeming copyrights to be community property, co-owned by the spouses, would risk inflicting major damage on the Act's goals of predictability and certainty of copyright ownership, national uniformity, and avoidance of practical difficulties of determining and enforcing an author's rights under the differing laws of various states.⁷⁷ The court found that "Congress may determine that community property

69. *Id.*

70. The court in *Granger* quoted from *Curtis v. Curtis*, 403 So. 2d 56, 59-60 (La. 1981): We have stated in cases involving bank accounts that the mere mixing of separate funds and community funds in the same account does not of itself convert an entire account into community property; only when separate funds are commingled with community funds indiscriminately so that the separate funds cannot be identified or differentiated from the community funds are all the funds characterized as community funds. Where separate funds can be traced with sufficient certainty to establish the separate ownership of property paid for with those funds, the separate status of such property will be upheld.

(internal citations omitted).

71. 55 F. Supp. 2d 534 (E.D. La. 1999).

72. 17 U.S.C. §§ 101-702 (1994).

73. La. Civ. Code art. 2338 provides, in part: "The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse. . . ."

74. La. Civ. Code art. 2336 provides, in part: "Each spouse owns a present undivided one-half interest in the community property."

75. *Rodrigue*, 55 F. Supp. 2d at 540-41 (quoting 17 U.S.C. § 201).

76. *Rodrigue*, 55 F. Supp. 2d at 541.

77. *Id.* at 547.

law and copyright law are best served when the author spouse retains sole management and control of the copyright while the non-author spouse shares only in the more tangible benefits."⁷⁸ The court concluded that a copyright is separate property of the author spouse upon its creation.⁷⁹

III. ALLOCATION OF ASSETS

The community property partition law provides for the allocation, or assigning, of community assets and liabilities under an "aggregate" theory of partition.⁸⁰ *T. L. James & Co. v. Montgomery*,⁸¹ *Sims v. Sims*⁸² and their progeny⁸³ adopted the "reserved jurisdiction" or "fixed percentage method" in the partition of retirement benefits to be received in the future. *Hare v. Hodgins*⁸⁴ revised *Sims*⁸⁵ to provide that this method was not the exclusive one that could be used in partitioning future retirement benefits.⁸⁶ The court stated that in appropriate cases the court could attempt to calculate the "present value" of pension benefits projected for the employee spouse's future retirement. When using this approach, "the benefits payable must be adjusted and discounted for contingencies such as mortality, interest, probability of vesting, probability of continued employment and retirement life expectancy."⁸⁷

One of the pitfalls in using this approach, or method, was evident in the first case using it, which was reviewed by the supreme court, *Blanchard v. Blanchard*.⁸⁸ In that case, the wife was an accountant and a member of the Teachers' Retirement System of Louisiana (TRSLA). Having been employed for twenty years, she was eligible to retire at a reduced retirement benefit, but had chosen to continue to work in order to receive substantially higher retirement benefits.⁸⁹ The Teachers' Retirement System of Louisiana is a defined benefit plan.⁹⁰ An expert testified that if Mrs. Blanchard had retired after twenty years of service, the community portion of the wife's pension would be 87%,⁹¹ and the present value of that interest would be \$87,585.04.⁹² The parties stipulated that the community interest in her pension

78. *Id.* at 546.

79. *Id.* at 541.

80. La. R.S. 9:2801(4) (1997). See 1 Katherine S. Spaht & W. Lee Hargrave, *Matrimonial Regimes* § 7.26, at 464, in 16 Louisiana Civil Law Treatise (2d ed. 1997).

81. 332 So. 2d 834 (La. 1975).

82. 358 So. 2d 919 (La. 1978).

83. *Frazier v. Harper*, 600 So. 2d 59 (La. 1992); *Hare v. Hodgins*, 586 So. 2d 118 (La. 1991).

84. 586 So. 2d 118 (La. 1991).

85. 358 So. 2d 919 (La. 1978).

86. *Hare*, 586 So. 2d at 126.

87. *Id.* at 124.

88. 731 So. 2d 175 (La. 1999).

89. *Id.* at 177. Since Mrs. Blanchard had been employed by the Jefferson Parish School System for twenty years, she was eligible for retirement and could have retired on November 6, 1995.

90. *Id.*

91. *Id.*

92. *Id.* at 177 n.4.

would be 60% and the present value of the community portion of the pension would be \$50,267.00 if Mrs. Blanchard did not retire until November 7, 2004, the date upon which she would have thirty years of service.⁹³ The allocation of assets and the equalizing payment were based upon this stipulated present value. The parties also owned a house, which was community property, valued at \$44,000.00.⁹⁴ The trial court allocated the pension to the wife at a value of \$50,267.00 and the house to the husband at a value of \$44,000.00, and ordered the wife to pay an equalizing payment to the husband.⁹⁵ The court of appeal reversed.⁹⁶ The supreme court affirmed the decision of the court of appeal, pointing out that the wife had been allocated little more than an "expectancy" of an asset, her future retirement benefits, and the husband had been allocated an unencumbered immovable, which is a presently marketable asset.⁹⁷ The court noted the absence of other "marital assets" to satisfy the claim of the non-employed spouse without undue hardship to the employee spouse and held that the allocations were unfair to the employee spouse.⁹⁸

Not discussed in the opinion of the supreme court are the potential dangers in using the "present cash value"⁹⁹ method in the division of an unmatured defined benefit retirement plan. The court pointed out that neither party had complained of the valuation of the pension and that the court therefore assumed, without deciding, "that plaintiff's pension can indeed be accurately valued for the purposes of determining whether the present cash value method should be employed in the disposition of the pension at issue."¹⁰⁰ Therefore, in the opinion, the court referred to the "present cash value" in the context of the *disposition* of the community interest in the pension, not its *valuation*.¹⁰¹ Therefore, one should not read too much into the opinion; the decision simply held that in the fact-intensive case presented, the allocations were inequitable under the circumstances presented.¹⁰²

However, the court's apparent reliance on the absence of other community assets¹⁰³ does not address the potential dangers involved in using the present cash

93. As noted later, the court *assumed*, but did not decide, that these calculations and conclusions of Mr. Blanchard's expert and "the agreed upon value" were correct. *Id.* at 178. The court stated that the "parties' stipulation to the pension's present value obviates the need for us to address this issue." *Id.*

94. *Id.* at 177.

95. *Id.* at 178.

96. *Blanchard v. Blanchard*, 697 So. 2d 275 (La. App. 5th Cir. 1997).

97. *Blanchard v. Blanchard*, 731 So. 2d 175, 182-83 (La. 1999).

98. *Id.* at 183.

99. A trial court can attempt to calculate the "present value" of pension benefits projected for the employee spouse's future retirement years. Under this approach, the benefits payable must be adjusted and discounted for contingencies such as mortality, interest, probability of vesting, probability of continued employment and retirement life expectancy.

Hare v. Hodgins, 586 So. 2d 118, 124 (La. 1991).

100. *Blanchard*, 731 So. 2d at 179.

101. *Id.*

102. *Id.* at 182.

103. Consequently, we hold that the trial court erred in employing the present cash value method for allocation of the pension rights in this case. The nature of these two assets, an

value method in the division of an employed spouse's interest in an unmatured defined benefit retirement plan. Every "fact" used in the calculation of the present value of an unmatured pension is an *assumed* fact. Take the case of Mrs. Blanchard. At the time that the present value of her retirement was calculated, she had been employed for twenty years.¹⁰⁴ To receive maximum retirement benefits, she has to continue her employment for another ten years, and the calculation was based upon the assumption that she would continue to be employed for the required additional ten years.¹⁰⁵ Her working for this maximum period in order to receive the maximum retirement benefit is either a suspensive or a resolutive condition to her employer's obligation to pay her retirement benefits in that amount.¹⁰⁶ Will Mrs. Blanchard work another ten years? Will her employment terminate before that time by reason of her death,¹⁰⁷ voluntary ceasing of employment, inability to work because of disability, or involuntary termination of employment? The amount of her retirement is determined, in part, by calculating a percentage of her highest average compensation, defined as the annual average of her three highest years' salary.¹⁰⁸ Normally, the highest salaries are received in the latter years of service. What will her highest three years' salary turn out to be? The calculation also assumes the life expectancy of Mrs. Blanchard when she reaches retirement age. Besides the problem occasioned by the fact that life expectancy and mortality tables frequently do not agree with each other,¹⁰⁹ the assumption must be that Mrs.

unmatured pension and an unencumbered piece of immovable property, when considered along with the lack of sufficient marital assets to lessen the impact of such an award on the wife, simply precludes a finding that the trial court fairly allocated the community assets.

Id. at 183.

104. *Id.* at 177.

105. *Id.* at 178.

106. See Spaht & Hargrave, *supra* note 31, at 483 nn.7-8, for a discussion of whether the condition is suspensive or resolutive.

107. The probability that a person of a stated age will live to another stated age may be calculated by use of the Vital Statistics of the United States Tables, *infra* note 109 or other published tables of life expectancy, sometimes referred to as mortality tables.

108. The difference in benefit amount arises from the difference in the benefit equation.

Upon reaching thirty years of service, plaintiff's benefit is calculated by multiplying her total years of service by 2½%, versus 2%, times the highest average compensation, defined as the "annual average of the three highest years' salary. . . ." *Louisiana Teacher Retirement Handbook* p. 5 (Revised ed. Aug. 1995). The difference in monthly benefit amount would be \$1,225.33 per month versus \$692.06 per month.

Blanchard, 731 So. 2d at 177, n.5.

109. La. R.S. 47:2405 (1990) provides a table of life expectancies according to the table known as the American Experience Table of Mortality. These life expectancies are used in valuing for Louisiana Inheritance Tax purposes any legacy or donation mortis causa which consists in whole or in part of an annuity or usufruct or right of use or habitation. According to this table, the life expectancy of a person who is 65 years of age is 11.10 years.

According to the Statistical Abstract of the United States 1991, *U.S. National Center for Health Studies*, Vital Statistics of the United States, Annual, reprinted in Item No. 92, "Expectation of Life and Expected Deaths, by Race, Sex, and Age: 1988," Am. Jur. 2d Desk Book 607 (1992), the life expectancy of a 65 year old generally is 16.9 years; for white males it is 14.9 years; for white females 18.7 years; for black males 13.4 years; and for black females 16.9 years. The actuarial tables that are

Blanchard will live out her life expectancy projected in the particular table used, and no more. If she in fact does not live out her tabular life expectancy or exceeds that expectancy, the resulting present cash value is skewed. Is the assumed retirement benefit calculated on the basis of the retiree's life expectancy alone, the life expectancy of the retiree's designated beneficiary, or the joint life and last survivor life expectancy of the retiree and her designated beneficiary? What assumption is to be made about the option which Mrs. Blanchard may elect under the Teachers' Retirement System of Louisiana? What cost of living increases in the retirement benefit may there be while the retiree is drawing her retirement benefits?¹¹⁰

A sum certain due at a certain future date has a present value less than that sum not yet due, but due in the future, because of the time value of money.¹¹¹ In order to calculate the present value of the sum certain due at a future certain date, a discount rate is applied. The discount rate selected is a variable affecting the present value of a future payment.¹¹² The greater the discount rate is, the smaller the present value is. The smaller the discount rate is, the greater the present value is.¹¹³ In determining the present value of Mrs. Blanchard's retirement on the date of the partition proceedings, two steps are involved. First, the value of the future retirement benefits must be calculated as of the date of her retirement, using the

used in computing the expected return under commercial annuity contracts involving life expectancy for amounts received as an annuity after June 30, 1986 for federal tax purposes assumes a life expectancy for a 65 year old person to be 20.0 years. Reg. §§ 1.72-6(d). See 1A Fed. Tax Guide Rep. (CCH) ¶ 23,001, "Tables for Commercial Annuities Received after June 30, 1986," at 26,703 (1997).

110. Cost of living adjustments that are included in the defined benefits of the plan must be factored in the calculation of the present value of the future benefits under this type of plan. See Robert R. Trout, *Valuing Pensions as Illiquid Assets*, 15 Community Prop. J., Apr. 1988 at 78-85. See also Fred Nordhauser, *The Valuation of Defined Benefit Retirement Plan Benefits in Community Property Settlements*, 9 Community Prop. J., Fall 1982, at 299-306, for a discussion of the methodology and a formula for such a valuation. Each of these authors discusses the unknown and assumed facts and variables involved in the valuation of unmatured retirement benefits in a defined benefit plan.

111. The time-value-of-money or present-value concept is now generally understood and widely accepted. This concept holds that the present value of an amount (available now) will be equivalent to a known, but larger amount to be available at a future date. This is true because pure interest (ignoring inflation and risk for the moment) may be earned on the present-value amount and accumulated to the larger amount at a future date. The present-value concept is important because the stream of the periodic retirement payments to be paid in the future may be discounted to a present-value amount or lump-sum equivalent valuation. The retirement payments in present-value terms (a lump-sum amount) will then be comparable to the valuation of other community property. In addition to the time-value-of-money concept, the interest rate or discount rate includes an inflation component and a risk component as well.

Nordhauser, *supra* note 110, at 302-03.

112. If a person is to receive \$10,000.00 ten years in the future, that expectancy is not worth \$10,000.00 today. If a discount rate of 10% is chosen to determine the present value of \$10,000.00 to be received in 10 years, the present value is \$3,855.43. This is the amount which, if invested at 10% compound interest, will yield \$10,000.00 in 10 years. If, however, a 6% discount rate is chosen, the present value of the \$10,000.00 is \$5,583.95. See Compound Interest and Annuity Tables, Item No. 360, Am. Jur. 2d Desk Book at 1194 (1992).

113. See the illustration, *id.*

assumptions and variables discussed. Then that calculated value must be further discounted in order to obtain the present value of that sum as of the date of the partition proceedings. The discount rate used in both these calculations, the facts assumed in both calculations, and the percentage discount given for the possibility that each of these assumed facts will or will not happen all affect the present value of Mrs. Blanchard's retirement benefits as of the date of the partition proceedings. This calculation is commonly known as determining the present value of a future annuity.

If any of the assumed facts fails to occur, one of the spouses will benefit and the other will be prejudiced. If the employed spouse dies before retirement, or does not live out his life expectancy after retirement, that spouse's estate is prejudiced and the other spouse benefitted. The converse is true if the retired spouse lives longer than his life expectancy or the employed spouse earns more than was assumed (with the result that the actual retirement benefit is greater than that which was assumed); the employed spouse is benefitted and the other spouse is prejudiced. Any change in an assumed fact or combination of assumed facts will produce a similar result. Although allowances (discounts) for the statistical probability of each of these events happening (or not happening) may be used in the calculations, those discounts only attempt to ameliorate the risk involved in the partitioning of an unmatured defined benefit plan based upon its calculated present cash value; they do not eliminate the risk.

The speculative nature of the calculation of the present value of an unmatured defined benefit plan also applies to a lesser extent in a matured defined benefit plan. If the employed spouse is retired, two facts are known, not assumed: the fact of retirement and the present amount of the retirement benefits. However, whether the retired spouse will live out his life expectancy, or live longer than it, and the amount of any cost of living increases, if provided for in the plan, remain assumed facts. The variable of the discount rate used is still present.

It may be argued, with some merit, that this process is not any riskier nor more speculative than the awarding of damages for future loss of earnings, medical bills, pain and suffering, disability, disfigurement, and other special and general future damages. The difference is that in this case there is available an alternate method of solving the problem, the application of the fixed percentage, or reserved jurisdiction method.

A non-employed spouse may be agreeable to the use of the present cash value method for several reasons, among which are the necessity or desirability of immediately receiving cash or other compensating assets, to preclude the possibility of losing any interest in the retirement because of the death of the employed spouse prior to retirement,¹¹⁴ and other reasons. The employed spouse who has remarried

114. This is what occurred in *Sims v. Sims*, 358 So. 2d 919 (La. 1978). The Supreme Court decreed that Mrs. Sims (the first wife of Mr. Sims) was entitled to the portion of the pension benefits of Mr. Sims which were attributable to his credible service during the existence of the community, "if and when they became due in the future." *Sims*, 358 So. 2d at 923. Subsequently, Mr. Sims died prior to retirement. He named his second wife as the beneficiary of his survivor annuity. In subsequent litigation, *Matter of Succession of Sims*, 464 So. 2d 991 (La. App. 1st Cir. 1985), the court held that

may want his entire retirement benefit available for him and his new spouse. However, before consenting to this method of partitioning the retirement benefits of a defined benefit plan, the risks involved should be clearly understood and evaluated by both the employed spouse and the other spouse.

Although the Supreme Court has stated, in the abstract, that such a plan may be partitioned in this manner, it remains to be seen whether or not that court will approve it as a fair and equitable method of partitioning a community interest in an unmatured defined benefit plan, and perhaps more importantly, whether such a partition complies with the mandate of Louisiana Revised Statutes 9:2801(4)(b) that "each spouse receives property of an equal net value." In an appropriate case, the Supreme Court may be called upon to decide the question that was obviated by the stipulation of the parties in *Blanchard*:¹¹⁵ may an unmatured defined benefit pension plan "indeed be accurately valued" by the use of the present cash value method of valuation?

The same uncertainty is not present in the valuation of a defined contribution plan. The value of the participant's interest and the community interest may be determined at any time. All of the necessary facts are known. The non-participant spouse's interest can be carved out, transferred to a segregated account, transferred or rolled over into another retirement plan, if permitted, or into a rollover Individual Retirement Account (IRA).

The case of *Stewart v. Stewart*¹¹⁶ involved an allocation of community assets in a partition proceeding. The trial court ordered that the community property be partitioned by public sale. Both spouses appealed. The appellate court correctly held that the methods of partitioning community property set forth in the community property partition act, Louisiana Revised Statutes 9:2801,¹¹⁷ are

there was no retirement benefit available because of the death of Mr. Sims prior to retirement and that the first Mrs. Sims had no claim on the survivor annuity due the second Mrs. Sims. The claim of the first Mrs. Sims was limited to one-half of the community contributions to the retirement.

115. 731 So. 2d 175 (La. 1999).

116. 728 So. 2d 473 (La. App. 3d Cir. 1998), *writ denied*, 740 So. 2d 114 (La. 1999).

117. La. R.S. 9:2801(4)(1997), states, in part:

The court shall then partition the community in accordance with the following rules:

- (a) The court shall value the assets as of the time of trial on the merits, determine the liabilities, and adjudicate the claims of the parties.
- (b) The court shall divide the community assets and liabilities so that each spouse receives property of an equal net value.
- (c) The court shall allocate or assign to the respective spouses all of the community assets and liabilities. In allocating assets and liabilities, the court may divide a particular asset or liability equally or unequally or may allocate it in its entirety to one of the spouses. The court shall consider the nature and source of the asset or liability, the economic condition of each spouse, and any other circumstances that the court deems relevant. As between the spouses, the allocation of a liability to a spouse obligates that spouse to extinguish that liability. The allocation in no way affects the rights of creditors.

In the event that the allocation of assets and liabilities results in an unequal net distribution, the court shall order the payment of an equalizing sum of money, either cash or deferred, secured or unsecured, upon such terms and conditions as the court

mandatory¹¹⁸ and that partition by licitation, or public sale, is allowed only when the community property cannot be allocated, sold at private sale, or assigned by drawing lots.¹¹⁹ However, the court unfortunately stated that partitions in kind are favored where the nature of property permits,¹²⁰ citing *Crews v. Crews*.¹²¹ *Crews* was decided under law predating Louisiana Revised Statutes 9:2801. At that time, and at the present time with respect to property that is not former community property,¹²² property was partitioned pursuant to the "item theory,"¹²³ under which each item of property was examined to determine whether or not it was divisible in kind. To be divisible in kind, an asset must be divisible into equal parts having equal or nearly equal values.¹²⁴ If not, it is partitioned by licitation or by private sale.¹²⁵ Under Louisiana Revised Statutes 9:2801, partition in kind is not "favored." The preferred method of partition of former community property is the allocation or assignment of all of the assets and liabilities to the respective spouses.¹²⁶ In this allocation, the court may divide a particular asset or liability equally or unequally or may allocate it in its entirety to one of the spouses.¹²⁷

shall direct. The court may order the execution of notes, mortgages, or other documents as it deems necessary, or may impose a mortgage or lien on either community or separate property, movable or immovable, as security.

(d) In the event that the allocation of an asset, in whole or in part, would be inequitable to a party, the court may order the parties to draw lots for the asset or may order the private sale of the asset on such terms and conditions as the court deems proper, including the minimum price, the terms of sale, the execution of realtor listing agreements, and the period of time during which the asset shall be offered for private sale.

(e) Only in the event that an asset cannot be allocated to a party, assigned by the drawing of lots, or sold at private sale, shall the court order a partition thereof by licitation. The court may fix the minimum bids and other terms and conditions upon which the property is offered at public sale. In the event of a partition by licitation, the court shall expressly state the reasons why the asset cannot be allocated, assigned by the drawing of lots, or sold at private sale.

118. *Stewart*, 728 So. 2d at 475-76.

119. *Id.* at 476.

120. *Id.*

121. 432 So. 2d 377, 379 (La. App. 1st Cir. 1983).

122. *See* La. Civ. Code arts. 810-16.

123. *Spaht & Hargrave*, *supra* note 31, at 464.

124. *Connally v. Nevils*, 702 So. 2d 1043 (La. App. 3d Cir. 1997); *Simpson v. Baker*, 687 So. 2d 1079 (La. App. 2d Cir. 1997), *writ denied*, 692 So. 2d 420 (La. 1997).

125. La. Civ. Code art. 1339 (1870), repealed by 1991 La. Acts No. 689, § 1. La. Civ. Code art. 811, added 1990 La. Acts No. 990, §1, eff. Jan. 1, 1991, provides:

When the thing held in indivision is not susceptible to partition in kind, the court shall decree a partition by licitation or by private sale and the proceeds shall be distributed to the co-owners in proportion to their shares.

126. La. R.S. 9:2801(4)(c) (1997).

127. *Id.*

IV. REIMBURSEMENT CLAIMS

*Stewart v. Stewart*¹²⁸ also addressed two reimbursement issues. The first involved the increase in value during the community of the separate shares of stock of the husband. The court treated the issue as if it were a classification issue, i.e., whether the increase in value of the stock is separate or community property.¹²⁹ The court correctly invoked Louisiana Civil Code article 2368 for the analysis.¹³⁰ That article¹³¹ regulates one of the five types of reimbursement claims that may be asserted by spouses, not the classification of the property of married persons as community or separate. The article defines, not the classification of property, but the *measure of reimbursement* if the separate property of a spouse has increased in value as a result of the uncompensated common labor or industry of the spouses.¹³² Not only is it conceptually incorrect to treat a reimbursement issue as a classification issue, there are very practical reasons for distinguishing between the two types of issues. The difference in the result of classifying the increase in value as community property or allowing a reimbursement claim for one-half of the increase in value may be significant.

128. 728 So. 2d 473 (La. App. 3d Cir. 1998), *writ denied*, 740 So. 2d 114 (La. 1999).

129. *Id.* at 477-78.

Mr. Stewart correctly contends that the trial court erred when it classified the increase in value of his stock as part of the community property. The trial court was correct in classifying the stock itself as Mr. Stewart's separate property, since the stock was acquired by Mr. Stewart two years prior to his marriage to Dianne Stewart. *See* La. Civ. Code art. 2341.1. Because the stock is Mr. Stewart's separate property, the court incorrectly applied La. Civ. Code art. 2338 which pertains to community property. Instead, the court should have applied La. Civ. Code art. 2368 which pertains to an increase in value of separate property. . . . In applying Article 2368, it is necessary for this court to determine whether the increase in the value of Mr. Stewart's stock ownership plan was the result of his uncompensated labor or industry. *Krielow v. Krielow* and *Salley v. Salley* are persuasive. In both *Krielow* and *Salley*, the court was faced with the same issue. In each case, *the court had to decide whether the increase in value of a spouse's stock*, which was his separate property, *should be included in the community property of which the wife is entitled to one-half under La. Civ. Code art. 2368*. . . . Because Mr. Stewart did not prove that the increase in the stock's value was based on the uncompensated labor of Mr. Stewart, she failed to sustain the burden of proving a claim under Article 2368. For these reasons, the trial court's judgment is reversed, and *the increase in value of Mr. Stewart's stock is properly categorized as his separate property*.

Id. (emphasis added) (internal citations omitted).

130. *Id.* at 477.

131. La. Civ. Code art. 2368 provides:

If the separate property of a spouse has increased in value as a result of the uncompensated common labor or industry of the spouses, the other spouse is entitled to be reimbursed from the spouse whose property has increased in value one-half of the increase attributed to the common labor.

132. The measure of reimbursement in those instances covered by La. Civ. Code arts. 2364-67 is one-half of the value of the separate or community thing used for one of the enumerated purposes. In contrast, the measure of reimbursement in the situation governed by La. Civ. Code art. 2368 is one-half of the increase in value of the separate property attributable to the uncompensated or undercompensated labor or industry of a spouse.

If separate stock, worth \$10,000.00 at the time of marriage, enjoys an increase in value of \$20,000.00 during the legal regime due to uncompensated or under compensated efforts of a spouse, the reimbursement claim of the other spouse is one-half of the increase in value during that regime, or \$10,000.00. The stock remains separate property. If it thereafter increases in value to \$100,000.00, the owner of the separate stock enjoys the benefit of that additional increase in value. If, however, the increase in value is treated incorrectly as community property, the non-owner spouse has an ownership interest in the stock worth \$10,000.00, or one-third of its value, at the time of partition. That owner should share in the subsequent \$70,000.00 increase in value in proportion to that owner's ownership interest in the stock. Some community property states apportion title according to the respective community and separate contributions of money or labor.¹³³ Louisiana has never adopted that approach for corporeal property, and the Supreme Court, at least with respect to immovables, has expressly rejected it in *Curtis v. Curtis*.¹³⁴

The second reimbursement issue in *Stewart*¹³⁵ involved a claim for expenses a spouse incurred in the maintenance of the two family automobiles that were used exclusively by her during her separation from her husband. The court adhered to the Third Circuit's denial of reimbursement for maintenance expenses of a depreciable movable used by the claimant.¹³⁶ This view is based upon the view that an automobile is a depreciable asset and the use of it is directly related to its depreciation, and that allowing a reimbursement claim under these circumstances would be inequitable.¹³⁷ Although not basing its decision on it, the court mentioned a sounder ground for either offsetting or reducing the reimbursement claim.¹³⁸ In the period between termination of the community and partition of community things, a spouse has a duty to preserve former community property under his control.¹³⁹ The incurring of ordinary maintenance expenses of an automobile is

133. See, e.g., *Nichols v. Nichols*, 372 P. 2d 758 (Idaho 1962); *Gapah v. Gapah*, 277 P. 2d 278 (Idaho 1954); and *Estate of Freeburn v. Freeburn*, 555 P. 2d 385 (1976). See also the Washington cases cited in Harry M. Cross, *Community Property: A Comparison of the Systems in Washington and Louisiana*, 39 La. L. Rev. 479, 485 n.30 (1979), and the cases from other community property states cited in W. O. Huie, *Separate Ownership of Specific Property Versus Restitution from Community Property in Louisiana*, 26 Tul. L. Rev. 427 (1952).

134. 403 So. 2d 56 (La. 1981).

135. 728 So. 2d 473 (La. App. 3d Cir. 1998), writ denied, 740 So. 2d 114 (La. 1999).

136. *Stewart*, 728 So. 2d at 477.

137. *Id.* at 476.

138. *Id.* La. Civ. Code art. 2369.3 states that "a spouse has a duty to preserve and to manage prudently former community property under his control." However, La. Civ. Code art. 806 provides:

A co-owner who on account of the thing held in indivision has incurred necessary expenses, expenses for ordinary maintenance and repairs, or necessary management expenses paid to a third person, is entitled to reimbursement from the other co-owners in proportion to their shares.

If the co-owner who incurred the expenses had the enjoyment of the thing held in indivision, his reimbursement shall be reduced in proportion to the value of the enjoyment.

139. La. Civ. Code art. 2369.3 provides:

A spouse has a duty to preserve and to manage prudently former community property under

consistent with this preservation obligation. If the using co-owner who incurred the ordinary maintenance expenses had the enjoyment (use) of the co-owned thing, his reimbursement should be reduced in proportion to the value of that enjoyment.¹⁴⁰ If the spouse who has the use of an automobile spends \$12,000.00 in maintenance (not operating) expenses, and the lease or rental value of the vehicle during that period is \$5,000.00, his reimbursement claim of \$6,000.00 should be reduced by \$2,500.00 to the sum of \$3,500.00. This codal analysis is preferable to one based upon whether the asset used is depreciable or not, and, if so, whether the depreciation is directly related to its use or to other factors.

V. INTERSPOUSAL DONATIONS

For 134 years, from 1808 to 1942, all donations *inter vivos* between married persons were revocable by the donor for any cause or for no cause, either during marriage or after divorce. In 1942, Louisiana Civil Code article 1749 (1870)¹⁴¹ was repealed and Louisiana Revised Statutes 9:2351¹⁴² was enacted, providing that every donation made after twelve o'clock noon on July 29, 1942, by a married

his control, including a former community enterprise, in a manner consistent with the mode of use of that property immediately prior to termination of the community regime. He is answerable for any damage caused by his fault, default, or neglect.

A community enterprise is a business that is not a legal entity.

This and the other rules contained in La. Civ. Code arts. 2369.2-2369.8 apply to former community property only when the community property regime terminates for a cause other than death or judgment of declaration of death of a spouse. La. Civ. Code art. 2369.1. In that instance, these special rules apply to former community property until a partition, or the death or judgment of declaration of death of a spouse. *Id.* In all other cases, the ownership in indivision rules of La. Civ. Code arts. 797-818 apply to co-owned former community property.

140. La. Civ. Code art. 806. The writer discussed another application of this article in Rigby, *supra* note 1, at 510.

141. La. Civ. Code art. 1749 (1870), repealed by 1942 La. Acts No. 187, § 4 provided:

All donations made between married persons, during marriage, though termed *inter vivos*, shall always be revocable.

The revocation may be made by the wife, without her being authorized to that effect by her husband, or by a court of justice.

Article 1742 of the La. Civil Code of 1825 and Article 224 of the La. Civil Code of 1808 contained the same provision.

142. La. R.S. 9:2351 (1991), enacted by 1942 La. Acts No. 187, § 1, as amended by 1950 La. Acts No. 316, § 1, provides:

Every donation made after twelve o'clock noon, July 29, 1942, by a married person to his or her spouse shall be as irrevocable as if made to a stranger. However, where the donation is made by notarial act the donor may reserve the right of revocation by express stipulation therein. Any right of revocation so reserved unless renounced as provided in R.S. 9:2352, may be exercised at any time during the life of the donor, whether or not the marriage is then in existence, and whether or not the donee is then alive.

La. R.S. 9:2352 (1991), enacted by 1942 La. Acts No. 187, § 2, provides:

When the donor may revoke a donation previously made to the spouse, either because the donation was made prior to 12 o'clock noon, July 20, 1942, or because the right of revocation was reserved in the act of donation, the donor may renounce this right to revoke, by notarial act, which shall be recorded wherever the act of donation is recorded.

person to his or her spouse shall be as irrevocable as if made to a stranger. This was done because of the decision in *Howard v. United States*,¹⁴³ which held that because the decedent husband possessed at his death a power of revocation of the *inter vivos* donation he had made to his wife, that the value of the donation had to be included in the decedent's gross estate under the federal estate law and regulations.

Also, for 182 years, from 1808 to 1990, the guilty spouse against whom a judgment of separation from bed and board or divorce was rendered on fault grounds lost the benefit of all donations made to that spouse by the other spouse, either in contemplation of marriage or during the marriage, but the innocent spouse retained the benefit of all such donations.¹⁴⁴ The provision was self-operative; no judgment decreeing the revocation of the donation was required.¹⁴⁵ The divorce or separation judgment on fault grounds effected the revocation by operation of law of all donations made to the guilty spouse by the other spouse.¹⁴⁶ Upon revocation of the donation, the donated property was classified as community property or as the separate property of the donor spouse pursuant to the existing rules for the classification of the property of married persons.¹⁴⁷ If the donated property was community property, it again was classified as community property upon revocation of the donation. If it was the separate property of the donor, it once again was so classified.¹⁴⁸ The provisions of former Louisiana Civil Code article

143. 125 F.2d 986 (5th Cir. 1942).

144. La. Civ. Code art. 156 (1870), repealed by 1990 La. Acts No. 1009, § 9, eff. Jan. 1, 1991, provided:

In cases of separation from bed and board, the party against whom it shall have been pronounced, shall lose all the advantages or donations, the other party may have conferred by the marriage contract or since, and the party at whose instance the separation has been obtained, shall preserve all those to which such party would have been entitled; and these dispositions are to take place even in case the advantages and donations were reciprocally made.

La. Civ. Code art. 152 (1825) and La. Civ. Code art. 18 (1808) contained the same provision.

La. Civ. Code art. 159 (1870), repealed by 1990 La. Acts No. 1009, § 9, eff. Jan. 1, 1991, provided:

The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony, between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them.

There was no article in the Louisiana Civil Codes of 1808 and 1825 corresponding to La. Civ. Code art. 159 (1870).

145. *Larocca v. Larocca*, 597 So. 2d 1000 (La. 1992); *Vaughn v. Coco*, 409 So. 2d 282 (La. App. 1st Cir. 1981); *Fertel v. Fertel*, 148 So. 2d 853 (La. App. 4th Cir. 1962); *Thigpen v. Thigpen*, 231 La. 206, 91 So. 2d 12 (1956).

146. See cases cited *supra* note 145.

147. *Vaughn v. Coco*, 409 So. 2d 282 (La. App. 1st Cir. 1981); *Thigpen v. Thigpen*, 231 La. 206, 91 So. 2d 12 (1956); La. Civ. Code arts. 2399-2446 (1870), repealed by 1979 La. Acts No. 709 § 1, eff. Jan. 1, 1980. See, for present classification of things as community or separate property, La. Civ. Code arts. 2334-44.

148. See cases cited *supra* note 147.

156 (1870) were not applicable if the separation or divorce was obtained on grounds of mutual fault¹⁴⁹ or on no-fault grounds.¹⁵⁰

Louisiana Civil Code article 156 (1870) was repealed when no-fault was instituted as the primary means of obtaining a divorce in 1990.¹⁵¹ However, some of the jurisprudence interpreting and applying it may still be viable.

After the repeal of Louisiana Civil Code article 156 (1870), attempts to revoke or annul interspousal *inter vivos* donations dramatically decreased. However, two recent cases may revive interest in the subject.

In *Whitman v. Whitman*,¹⁵² the wife during her marriage executed two donations to her husband of interests in separate immovable properties. She obtained a divorce based upon her husband's adultery. Thereafter, she instituted an action under Louisiana Civil Code articles 1559¹⁵³ and 1560(2)¹⁵⁴ (1870) to revoke the donations on the ground of her husband's ingratitude, in that he had been guilty towards her of cruel treatment and grievous injury in committing adultery. The court found that the donations were gratuitous donations,¹⁵⁵ not onerous donations¹⁵⁶ as contended by the husband, and were therefore subject to revocation for ingratitude. The court held that adultery by the donee spouse "constituted cruel treatment and grievous injury" to the donor spouse.¹⁵⁷

149. *Fargerson v. Fargerson*, 593 So. 2d 454 (La. App. 2d Cir. 1992).

150. *Roy v. Florane*, 239 La. 749, 119 So. 2d 849 (1960).

151. 1990 La. Arts No. 1009, eff. Jan. 1, 1991.

152. 730 So. 2d 1048 (La. App. 2d Cir. 1999).

153. La. Civ. Code art. 1559 (1870) provided:

Donation [Donations] *inter vivos* are liable to be revoked or dissolved on account of the following causes:

1. The ingratitude of the donee;
2. The non-fulfillment of the eventual conditions, which suspend their consummation;
3. The non-performance of the conditions imposed on the donee;
4. The legal or conventional return.

154. La. Civ. Code art. 1560 (1870) provided:

Revocation on account of ingratitude can take place only in the three following cases:

1. If the donee has attempted to take the life of the donor;
2. If he has been guilty towards him of cruel treatment, crimes or grievous injuries;
3. If he has refused him food, when in distress.

155. La. Civ. Code art. 1523 (1870) provided:

There are three kinds of donations *inter vivos*: The donation purely gratuitous, or that which is made without condition and merely from liberality; The onerous donation, or that which is burdened with charges imposed on the donee; The remunerative donation, or that the object of which is to recompense for services rendered.

156. La. Civ. Code art. 1524 (1870) provided: "The onerous donation is not a real donation, if the value of the object given does not manifestly exceed that of the charges imposed on the donee."

La. Civ. Code art. 1525 (1870) provided: "The remunerative donation is not a real donation, if the value of the services to be recompensed thereby being appreciated in money, should be little inferior to that of the gift."

La. Civ. Code art. 1526 (1870) provided: "In consequence, the rules peculiar to donations *inter vivos* do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services."

157. *Whitman*, 730 So. 2d at 1053.

A comparison of the revocation of an interspousal donation under former Louisiana Civil Code article 156 (1870) and under present Louisiana Civil Code article 1560 (1870) on the ground of ingratitude is instructive. Former Louisiana Civil Code article 156 (1870) was self-operative; no judgment decreeing the revocation of the donation was required.¹⁵⁸ The obtaining of a separation or divorce judgment on any fault ground, except mutual fault, effected the revocation of all interspousal donations to the guilty spouse by operation of the law.¹⁵⁹ Louisiana Civil Code article 1560 (1870) is not self-operative. An action to revoke the interspousal donation must be instituted, and the cause for the revocation must be proved. The causes are limited to those specified in Louisiana Civil Code article 1560 (1870). However, the divorce need not have been obtained either on one of the faults specified in article 1560 or any other fault ground. There may be a Louisiana Civil Code article 102 or 103(1) divorce, or there might not even be a divorce between the spouses.

These causes for revocation of a gratuitous donation on account of the ingratitude of the donee are similar to, but do not appear to be co-extensive with, the former fault grounds for a separation from bed and board¹⁶⁰ and for divorce.¹⁶¹ Cause one in Louisiana Civil Code article 1560 (1870) (donee has attempted to take life of donor) is the same cause as cause six in former Louisiana Civil Code article 138 (1870). Cruel treatment in cause two of article 1560 is included in cause three in former article 138. "Crimes" in cause two of article 1560 appear to

158. See cases cited *supra* note 145.

159. See cases cited *supra* note 145.

160. Former La. Civ. Code art. 138 (1870), as amended by 1956 La. Acts No. 303, repealed by 1990 La. Acts No. 1009, eff. Jan. 1, 1991, provided that separation from bed and board could be claimed for the following fault causes:

1. In case of adultery on the part of the other spouse;
2. When the other spouse has been convicted of a felony and sentenced to death or to punishment at hard labor in the state or federal penitentiary;
3. On account of habitual intemperance of one of the married persons, or excesses, cruel treatment, or outrages of one of them toward the other, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable;
4. Of a public defamation on the part of one of the married persons towards the other;
5. Of the abandonment of the husband by his wife or the wife by her husband;
6. Of an attempt of one of the married persons against the life of the other;
7. When the husband or wife has been charged with a felony, and shall actually have fled from justice, the wife or husband of such fugitive may claim a separation from bed and board, on producing proofs to the judge before whom the action for separation is brought, that such husband or wife has actually been guilty of such felony, and has fled from justice;
8. On account of the intentional non-support by the husband of his wife who is in destitute or necessitous circumstances, or by the wife of her husband, who is in destitute or necessitous circumstances.

161. Former La. Civ. Code art. 139 (1870), as amended by 1954 La. Acts No. 618, repealed by 1990 La. Acts No. 1009, eff. Jan. 1, 1991, provided that immediate divorce could be claimed for the following fault causes:

1. Adultery on the part of the other spouse.
2. Conviction of the other spouse of a felony and his sentence to death or imprisonment at hard labor.

be limited to crimes towards the donor, not crimes generally, because of the preceding qualifying clause, "If he has been guilty towards him of . . . crimes. . . ." The felony crime was not so limited in former La. Civil Code articles 138(2) and 139(2). It remains to be seen if conviction of a felony and sentence to death or to imprisonment at hard labor in the state or federal penitentiary (cause two of former articles 138 and 139) is held to constitute "grievous injuries" of the donee towards the donor (in cause two of article 1560), if the crime is unassociated with the other spouse or the marriage. Cause three of article 1560, the refusal by the donee of food to the donor spouse when the latter is in distress, may be held to be equivalent to cause eight of former article 138, the intentional non-support of a spouse who is in destitute or necessitous circumstances. It does not appear that abandonment, cause five in former article 138, would qualify under cause two of article 1560. The result was different under prior Louisiana Civil Code article 156. In *Fertel v. Fertel*,¹⁶² the husband donated to his wife an undivided one-half interest in an immovable, which was his separate property. Subsequently, the wife reconveyed by donation the one-half interest to the husband. The wife obtained a separation based upon abandonment. The court held that under Louisiana Civil Code article 156 (1870), the donation by the wife to the husband was a nullity. The husband sought a revocation of his original donation to his wife of the one-half interest under Louisiana Civil Code article 1560(2) (1870) on the grounds of ingratitude, claiming that she had been guilty of adultery. He was unsuccessful because he failed to prove her adultery. The court decreed that the half interest owned by the wife was her separate property.

In *Spruiell v. Ludwig*,¹⁶³ the institution of a shareholder derivative action by a daughter and grandchildren, which contained implied but unfounded claims of criminal activity by the mother and grandmother as officers and shareholders of family corporations, was held to constitute grievous injury sufficient to revoke on the ground of ingratitude the donations of stock in those family corporations by the mother and grandmother to the daughter and grandchildren. In *Perry v. Perry*,¹⁶⁴ a father donated to his son a substantial amount of stock in a corporation owned by the father. When the son became an attorney, the corporation entered into an agreement with the son to buy back the stock on an installment basis. The son prepared and the father signed a written guarantee of the contract. The corporation paid more than \$500,000.00 over a period of time before it was unable to continue payments. The son sued his father on the guarantee and obtained judgment of \$163,249.28. The son seized the contents of his parents' home, including jewelry, appliances, and furniture. During the seizure, his mother fainted and required medical attention. The court held that the actions of the son constituted grievous injury directed at his parents and supported a revocation of the donation of the stock by the father to the son on the ground of ingratitude.

162. 148 So. 2d 853 (La. App. 4th Cir. 1962), writ denied, 244 La. 133, 150 So. 2d 589 (1963).

163. 568 So. 2d 133 (La. App. 5th Cir. 1990).

164. 507 So. 2d 881 (La. App. 4th Cir. 1987).

The ingratitude of the donee spouse is not the only cause for revocation or nullity of a gratuitous interspousal donation *inter vivos*. Generally, all of the causes for the nullity or revocation of donations *inter vivos* apply to gratuitous interspousal donations *inter vivos*, in addition to causes specific to interspousal donations. These additional causes for the nullity or revocation of a gratuitous donation include improper form, lack of capacity of the donor or of the donee, lack of donative intent of the donor, lack of intent of the donor to permanently divest himself, at the time of the transaction, of the thing donated, donation of future property, lack of acceptance of the donation by the donee, fraud, duress, undue influence, and, possibly, error.

Louisiana Civil Code article 1468¹⁶⁵ sets forth the four essential elements of a valid gratuitous donation *inter vivos*: (1) the *present* divesting of a thing by the donor, (2) the *irrevocable* divesting of a thing by the donor, (3) the *giving* of a thing by the donor to the donee and (4) the *acceptance* of the donation by the donee. Additionally, by definition, a donation is *inter vivos*, that is, between living persons.

There are three kinds of donations *inter vivos*:¹⁶⁶ the donation purely gratuitous, or that which is made without condition and merely from liberality; the onerous donation, or that which is burdened with charges imposed on the donee; and the remunerative donation, or that the object of which is to recompense for services rendered.

In addition to the four essential elements of a valid gratuitous donation *inter vivos* stated in Louisiana Civil Code article 1468 (1870), for a transaction to be valid as a gratuitous donation *inter vivos*, the form requirements for this type of donation must be met. The required form of a donation *inter vivos* is generally determined by the nature of the thing donated. A gratuitous donation *inter vivos* of immovables, of incorporeal things, such as rents, credits, rights of action, and bank accounts,¹⁶⁷ and of movables that are not the object of a manual gift¹⁶⁸ must

165. La. Civ. Code art. 1468 (1870), as amended by 1871 La. Acts No. 87, provided: "A donation *inter vivos* (between living persons) is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it."

166. La. Civ. Code art. 1523 (1870), cited *supra* note 155.

167. La. Civ. Code art. 1536 (1870) provided: "An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property or incorporeal things, such as rents, credits, rights or actions, under the penalty of nullity."

A donation of immovable property by act under private signature is null. *Andrus v. Andrus*, 634 So. 2d 1254, 1257 (La. App. 3d Cir. 1994); *Hardin v. Williams*, 478 So. 2d 1214 (La. 1985).

168. A donation *inter vivos* is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it. [La. Civ. Code] art. 1468. The rules of form in the Civil Code require a valid donation *inter vivos* of movable property to be passed before a notary and two witnesses. The only exception is that of a manual gift of corporeal movables which, when accompanied by real delivery, is not subject to any formality. [La. Civ. Code] arts. 1538-39.

Fogg v. Fogg, 571 So. 2d 838, 841 (La. App. 2d Cir. 1990).

La. Civ. Code art. 1538 (1870) provided: "A donation *inter vivos*, even of movable effects, will not be valid, unless an act be passed of the same, as is before prescribed. Such an act ought to contain a detailed estimate of the effects given."

be in authentic form. Corporeal movables are subject to a manual gift.¹⁶⁹ A manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality.¹⁷⁰ However, the donor's intent to give the thing to the donee and actual possession of the corporeal movable by the donee must operate simultaneously.¹⁷¹ Incorporeal movables are not subject to a manual gift. Therefore, an attempted donation *inter vivos* of an interest in a bank account must be by authentic act; the placing of another's name on the account is insufficient to constitute a donation *inter vivos*.¹⁷² The credit right evidenced by a certificate of deposit is an incorporeal movable, and the attempted transfer of a certificate of deposit by placing a new name on it does not constitute a valid donation. An authentic act of donation is required.¹⁷³ The credit right evidenced by a certificate of deposit is an incorporeal movable and is not subject to a manual gift.¹⁷⁴

The form of a donation of a negotiable instrument is governed by the provisions of the Negotiable Instruments Law.¹⁷⁵ However, the provisions of that act supersede the Civil Code in matters of form only.¹⁷⁶ The underlying validity of a donation is a "threshold" requirement controlled by substantive rules on donations contained in the Civil Code.¹⁷⁷ Although a donation may be valid as to form, the substantive requirements of a divestment and donative intent must be fulfilled in order to effect a valid donation.¹⁷⁸ The donation of an automobile is governed by the provisions of the Civil Code governing donations rather than the provisions of the Vehicle Certificate of Title Law.¹⁷⁹

Spouses are subject to the same capacity requirements as other persons. The general rule is that all persons have capacity to contract.¹⁸⁰ A contract made by a

169. La. Civ. Code art. 1539 (1870) provided: "The manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality."

170. Money is a corporeal movable and may be donated by manual gift. *Mertens v. Mertens*, 688 So. 2d 1148 (La. App. 3d Cir. 1996); *Allen v. Allen*, 301 So. 2d 417 (La. App. 2d Cir. 1974). A check was payable to the husband and wife, was endorsed by the husband and delivered to the wife, who deposited it in a savings account opened solely in her name. The husband was aware of this and made no objection. These acts constituted a valid manual gift of the check. *Terrell v. Terrell*, 655 So. 2d 600 (La. App. 2d Cir. 1995).

171. *Montet v. Lyles*, 638 So. 2d 727, 730 (La. App. 1st Cir. 1994).

172. *Brown v. Brown*, 635 So. 2d 255 (La. App. 3d Cir. 1994); *Succession of Diffey*, 543 So. 2d 131 (La. App. 2d Cir. 1989).

173. *Poirier v. Poirier*, 664 So. 2d 532 (La. App. 3d Cir. 1995).

174. *Arnold v. Fenno*, 652 So. 2d 1078 (La. App. 4th Cir. 1995).

175. *Succession of Jones*, 505 So. 2d 841 (La. App. 2d Cir. 1987).

176. *Id.* at 844.

177. *Id.* at 845-46.

178. *Id.*

179. *Soileau v. Soileau*, 664 So. 2d 551 (La. App. 3d Cir. 1995); *Samanie v. Samanie*, 599 So. 2d 514 (La. App. 4th Cir. 1992); *Touchet v. Guidry*, 550 So. 2d 308 (La. App. 3d Cir. 1989).

180. La. Civ. Code art. 1470 provides: "All persons have capacity to make and receive donations *inter vivos* and *mortis causa*, except as expressly provided by law."

La. Civ. Code art. 1471 provides: "Capacity to donate *inter vivos* must exist at the time the donor makes the donation. Capacity to donate *mortis causa* must exist at the time the testator executes the testament."

person without legal capacity is relatively null, but may be rescinded only at the request of the person lacking capacity or his legal representative.¹⁸¹ In *Robertson v. Cubine*¹⁸² a 73 year old wife made a donation *inter vivos* in 1992 of immovable property to her husband of nearly 30 years. She was interdicted in 1996 because of Alzheimer's Disease. The donation was later attacked on the ground of the incapacity of the donor at the time of the donation. A person challenging the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor made the donation.¹⁸³ The court held that proving a matter by "clear and convincing evidence" requires establishing that the existence of a disputed fact is highly probable, that is, its existence is much more probable than its non-existence, and that the issue of capacity is a question of fact. It upheld the donation *inter vivos*.¹⁸⁴

Whether a juridical act constitutes a donation *inter vivos* or some type of transaction may depend upon whether there was, at the time of the transaction, a donative intent on the part of the donor.¹⁸⁵ This usually involves an inquiry as to whether the donor intended to *give* the thing in question to the donee, rather than sell, mortgage or otherwise hypothecate, lend, transfer title for the convenience of either party, or engage in some other type of transaction. In *Hamilton v. Hamilton*¹⁸⁶ a transaction in the form of a cash sale deed from the husband to the wife of an undivided one-half interest in a house was held to be a donation of that interest rather than a sale of the interest in the house. It was therefore not subject to rescission on the basis of lesion beyond moiety. The transaction was a relative

La. Civ. Code art. 1476 provides:

A minor under the age of sixteen years does not have capacity to make a donation either *mortis causa* or *mortis causa*, except in favor of his spouse or children.

A minor who has attained the age of sixteen years has capacity to make a donation, but only *mortis causa*. He may make a donation *inter vivos* in favor of his spouse or children.

La. Civ. Code art. 1477 provides: "To have capacity to make a donation *inter vivos* or *mortis causa*, a person must be able to comprehend generally the nature and consequences of the disposition that he is making."

La. Civ. Code art. 1482 provides:

A person who challenges the capacity of a donor must prove by clear and convincing evidence that the donor lacked capacity at the time the donor made the donation *inter vivos* or executed the testament. However, if the donor made the donation or executed the testament at the time when he was judicially declared to be mentally infirm, then the proponent of the challenged donation or testament must prove the capacity of the donor by clear and convincing evidence.

La. Civ. Code art. 1918 provides: "All persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting."

181. La. Civ. Code art. 1919 provides: "A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative."

182. 731 So. 2d 931 (La. App. 2d Cir. 1999).

183. *Id.* at 932. See also, La. Civ. Code art. 1482, cited *supra* note 180.

184. *Robertson*, 731 So. 2d at 936.

185. *Mertens v. Mertens*, 688 So. 2d 1148, 1150 (La. App. 3d Cir. 1996); *Arnold v. Fenno*, 652 So. 2d 1078, 1080 (La. App. 4th Cir. 1995); *Broussard v. Crochet, Broussard & Co.*, 477 So. 2d 166, 174 (La. App. 3d Cir. 1985).

186. 522 So. 2d 1356 (La. App. 2d Cir. 1988).

simulation¹⁸⁷ because the parties intended that their contract should produce effects between them although different from those recited in their contract.

*White v. White*¹⁸⁸ involved a remunerative donation¹⁸⁹ in the form of a cash sale. Two older children supported themselves, their mother, and three younger children when their father refused to pay support in accordance with a support judgment. The father later donated a house to these two older children. Still later, he attempted to revoke the donation on the ground of ingratitude, among other reasons. The court held that the transaction was a remunerative donation, not a sale, and that a remunerative donation was not subject to revocation on account of the ingratitude of the donees.¹⁹⁰

The donative intent may be express or implied. *Rutherford v. Rutherford*¹⁹¹ held that words in an act of donation indicating the donation was made "in consideration of the love and affection which he (the donor) bears for his nephew" clearly showed the donor's intent that the donation was purely gratuitous.¹⁹² In *Mobley v. Lee*¹⁹³ the intent to donate property to the donor's niece was held to be established by language in the act of donation that "in consideration of the love and affection which she bears for her niece . . . and for her personal care, she does . . . donate and deliver unto her . . . niece" the property described.¹⁹⁴

187. A contract is a simulation when, by mutual agreement, it does not express the true intent of the parties. La. Civ. Code art. 2025. If the parties intend that their contract shall produce no effects between them, the simulation is absolute. La. Civ. Code art. 2026. If the parties intend that their contract shall produce effects between them though different from those recited in their contract, the simulation is relative. La. Civ. Code art. 2027. In this instance, the contract produces between the parties the effects they intended, if all requirements for those effects have been met. La. Civ. Code art. 2027. For example, a simulated sale of an immovable may be a valid donation if the parties intended that their contract have that effect, and if the contract meets all of the requirements of form for the donation *inter vivos* of an immovable. See La. Civ. Code art. 1536. A counterletter is a separate writing that expresses the true intent of the parties. La. Civ. Code art. 2025. See *Bonnett v. Mize*, 556 So. 2d 228 (La. App. 2d Cir. 1990).

188. 7 So. 2d 255 (La. App. 2d Cir. 1942).

189. A remunerative donation is one in which the donor's object or purpose is to recompense the donee for services rendered. La. Civ. Code art. 1523 (1870). Unless the value of the object given in a remunerative donation exceeds by one-half the value of the services, the rules peculiar to donations *inter vivos* do not apply to the remunerative donation. La. Civ. Code art. 1526 (1870). Conversely, where the value of the service exceeds two-thirds the value of the gift, the transfer is not a true donation, and the rules peculiar to donations *inter vivos* do not apply. *Averette v. Jordan*, 457 So. 2d 691, 697 (La. App. 2d Cir. 1984). This case contains a "correct mathematical meaning of this codal mandate (which) has been a 'constant source' of jurisprudential confusion." *Averette*, 457 So. 2d at 697.

190. *Id.* See text accompanying *supra* notes 152-64, for discussion of the revocation of a donation *inter vivos* on the account of the ingratitude of the donee.

191. 338 So. 2d 319 (La. App. 3d Cir. 1976), writ granted, 341 So. 2d 409 (La.), *rev'd on other grounds*, 346 So. 2d 669 (La. 1977).

192. *Rutherford*, 338 So. 2d at 323.

193. 318 So. 2d 631 (La. App. 3d Cir. 1975).

194. *Mobley*, 318 So. 2d at 632.

Donative intent may also be implied from the circumstances.¹⁹⁵ Donative intent must be established by strong and convincing evidence, requiring more than the preponderance of the evidence.¹⁹⁶

Donative intent may also involve the question of whether the donor intended to permanently divest himself, at the time of the transaction, of the thing. In *Anderson v. Aetna Life & Casualty*¹⁹⁷ a husband and wife executed an act of donation in authentic form of their residence to two trusts for their children. The court held that the purported donation was invalid because the parents never had the requisite donative intent to irrevocably divest themselves of the house.¹⁹⁸ The court pointed out that, under Louisiana Civil Code article 1468, the donor must divest himself "at present" (at the time of the donation) and "irrevocably" of the thing given, in favor of the donee.¹⁹⁹ The evidence showed that the Andersons continued to live in the house; paid rent to the trusts; paid the *ad valorem* taxes on the property; paid all utilities, insurance and repairs; paid all mortgage payments; claimed the homestead exemption; remodeled the house; insured the house; paid the insurance premiums; and claimed the interest deduction for the mortgage interest paid.²⁰⁰

In *Stevens v. Stevens*²⁰¹ the wife executed a "cash sale deed" in which she purported to convey her interest in her former husband's military retired pay back to him if she remarried anyone except him. Treating the document as a donation because it did not qualify as a sale under Louisiana Civil Code articles 2439 and 2464,²⁰² the court held, *inter alia*, that it was not a valid donation because the donor did not divest herself "present and irrevocably of the thing given," the military retired pay.²⁰³

In order for a gratuitous *inter vivos* donation to be complete, it must be accepted by the donee.²⁰⁴ The acceptance generally must be "in precise

195. *Broussard v. Crochet, Broussard & Co.*, 477 So. 2d 166, 174 (La. App. 3d Cir. 1985); *Pardue v. Turnage*, 383 So. 2d 804, 805 (La. App. 1st Cir. 1980).

196. *Id.*

197. 535 So. 2d 1070 (La. App. 2d Cir. 1988).

198. *Anderson*, 535 So. 2d at 1074.

199. *Id.* at 1072.

200. *Id.* at 1071.

201. 476 So. 2d 883 (La. App. 2d Cir. 1985).

202. *Id.* at 889.

203. *Id.* The court did not discuss the proscription against the donation of future property. "A donation *inter vivos* can comprehend only the present property of the donor." If it comprehends property to come (future property), it is null as to the future property attempted to be donated. La. Civ. Code art. 1528 (1870). Excepted from this prohibition of the donation of future property are certain donations made by marriage contract. See La. Civ. Code arts. 1532, 1734-42, and 1743-55. See also *Sigur v. Sigur*, 652 So. 2d 1046 (La. App. 4th Cir. 1995).

204. La. Civ. Code art. 1540 (1870) provided:

A donation *inter vivos* shall be binding on the donor, and shall produce effect only from the day of its being accepted in precise terms.

The acceptance may be made during the lifetime of the donor by a posterior and authentic act, but in that case the donation shall have effect, with regard to the donor, only from the day of his being notified of the act establishing that acceptance.

terms."²⁰⁵ The Supreme Court in *Rutherford v. Rutherford*²⁰⁶ held that the requirement in Louisiana Civil Code article 1540 (1870) "that a donee accept the donation in 'precise terms' obligates the donee to use express, formal, and unconditional language in his acceptance," that the codal provisions require an explicit acceptance, and that "a tacit acceptance or an acceptance inferred from the circumstances will not suffice."²⁰⁷ *Stevens v. Stevens*²⁰⁸ held that the donation of retirement benefits, an incorporeal movable, required an acceptance in authentic form, that a tacit acceptance is not enough, and without an acceptance in proper form, the donation was invalid.²⁰⁹ A donation *inter vivos* is not binding on the donor and produces no effect until it is accepted by the donee. Consequently, the donor may withdraw or retract a donation until it is accepted by the donee. In *Works v. Noble*²¹⁰ a husband donated by authentic act immovable property to his minor children, who lived on the property with their grandparents. There was no express acceptance of the donation by the grandparents for the children. The validity of the donation was an issue in a subsequent suit. The court held that "the fact that the donation was revoked before it was accepted by or for the donees, makes it unnecessary to decide whether it would have been valid if it had been accepted before it was revoked."²¹¹ The court decreed the revocation to be valid,

205. *Id.*

206. 346 So. 2d 669 (La. 1977).

207. *Id.* at 671.

208. 476 So. 2d 883 (La. App. 2d Cir. 1985).

209. *Id.* at 889.

210. 177 La. 681, 149 So. 423 (1933).

211. *Works*, 149 So. at 424. Answering the contention of plaintiff that the donation of the immovable property was valid without acceptance because the minor donees were residing on the property with their paternal grandparents, Chief Justice O'Niell, author of the court's opinion, wrote:

The plaintiff contends that the donation made by his father to him and his brother on the 9th of January, 1908, was valid without acceptance because he and his brother were then residing on the property with their paternal grandparents. He relies upon article 1541 of the Civil Code, which declares that, if the donation has been executed, that is, if the donee has been put into corporeal possession "of the effects given," the donation shall have effect without an express acceptance. Article 1541 was not taken from the French Code, but was an original article, 1528, in the Code of 1825. In the French text, the words which have been translated into "of the effects given" were "des choses données." One of the legal definitions of the French word chose, according to Spier's & Surenné's French Pronouncing Dictionary, is choses, and another of the legal definitions of which is chattels, and the most commonplace definition of which is things. It is not improbable, therefore, that article 1528 of the Code of 1825, which is article 1541 of the Revised Civil Code, was intended originally to apply only to donations of movable property. As to that, we express no opinion, however, because we do not consider that the fact that the children to whom the donation was made were residing with their grandparents on the property donated dispensed with the necessity of an acceptance of the donation. According to article 1540 of the Code, an acceptance by authentic act is essential to the validity of a donation of real estate. It is true that article 1546 of the Code permits the grandparents to accept a donation for a minor grandchild, even though the parents are living, and even though neither of the grandparents is the tutor of the child. But that has reference to a formal acceptance as prescribed by article 1540.

Id.

stating that the acceptance of a donation *inter vivos* of immovables must be by authentic act.

If the donor has put the donee into corporeal possession of the thing donated, no express acceptance is required and the donation has full effect.²¹² In *Cotton v. Washburn*²¹³ a man was held to have donated to his prospective bride an undivided one-half interest in a house he bought by having the acquisition deed recite both of them as vendees. Upon their marriage, they moved into and occupied the house as their residence. The court held that the wife's moving into the house constituted an act of corporeal possession and an acceptance by her of the donation of the interest in the house.²¹⁴

The acceptance must be made by the donee, either personally or through the donee's attorney in fact,²¹⁵ during the donee's lifetime.²¹⁶ The acceptance cannot be made by his heirs or other successors.²¹⁷ If the thing donated is not the object

Fourteen years earlier, Chief Justice O'Niell, addressing the same issue in *Sisters of Charity of Incarnate Word v. Emery*, 144 La. 614, 81 So. 99 (1919), wrote:

Article 1541 of the Civil Code provides that, if a donation has been executed, that is, if the donor has put the donee into corporeal possession of the property donated, the donation shall have full effect, even though it was not accepted in express terms. Although the word "effects" is used instead of "property" in the article referred to, it has been decided that the provision refers to real estate. In fact, article 1541 would have no meaning or purpose whatever if it did not refer to real estate; because article 1539 provides that a manual gift, that is, the giving of corporeal movable effects, accompanied by actual delivery, is not subject to any formality.

Sisters of Charity, 81 So. at 102 (internal citations omitted).

212. La. Civ. Code art. 1541 (1870) provided:

Yet, if the donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects given, the donation, though not accepted in express terms, has full effect.

See also *Works v. Noble*, 177 La. 681, 149 So. 423 (1933) and *Sisters of Charity of Incarnate Word v. Emery*, 144 La. 614, 81 So. 99 (1919).

213. 228 La. 832, 84 So. 2d 208 (1955).

214. *Id.* The court did not cite nor discuss *Rutherford* or *Works*, but relied upon the provisions of La. Civ. Code art. 1541 (1870).

215. La. Civ. Code art. 1542 (1870) provided:

If the donee be of full age, the acceptance may be made by him, or in his name by his attorney in fact having special power to accept the donation which is made, or a general power to accept the donations that have been or may be made.

216. La. Civ. Code art. 1543 (1870) provided:

The acceptance can only be made by the donee personally, or by his attorney in fact during his life. If he refuse or neglect to accept, his creditors can not accept it in his stead, under the pretext that the refusal has been in fraud of their rights.

217. La. Civ. Code art. 1544 (1870) provided: "If the donee die before having accepted, the acceptance can not be made by his heirs, and the donation remains without effect."

Effective July 1, 1999, "Successor" is defined in La. Civ. Code art. 3506(28), as amended by 1997 La. Acts No. 1412, § 2, eff. July 1, 1999, as follows:

28. Successor. - Successor is, generally speaking, the person who takes the place of another.

There are in law two sorts of successors: the universal successor, such as the heir, the universal legatee, and the General legatee; and the successor by particular title, such as the buyer, donee or legatee of particular things, the transferee.

The *universal* successor represents the person of the Deceased, and succeeds to all his

of a manual gift, the acceptance may be made before delivery.²¹⁸ In this case, the donation is perfected and the ownership of the thing given is transferred to the donee at the time of acceptance although there has not been delivery to the donee of the thing donated.²¹⁹

If parties planning marriage make donations to each other in contemplation of their marriage, and the marriage does not take place, those donations fall.²²⁰ The donation is revocable even though the marriage does not take place through the fault of the donor.²²¹ Not surprisingly, all of these cases involve engagement rings.

Fraud or duress may render an interspousal donation *inter vivos* relatively null.²²² Fraud is defined as a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause loss or inconvenience to the other party.²²³ Fraud may also result from silence or inaction that is calculated to produce a misleading effect.²²⁴ In order for duress to vitiate the consent of the donor to make a donation, it must be "of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property or reputation."²²⁵ "Age, health, disposition, and other personal circumstances must be taken into account in determining reasonableness of the fear."²²⁶ Duress vitiates consent when the threatened injury is directed against the donor, an ascendant or descendant of the donor, or, in some cases, against other third

rights and charges.

The *particular* successor succeeds only to the rights appertaining to the thing which is sold, ceded or bequeathed to him.

218. La. Civ. Code art. 1550 provides: "A donation, duly accepted, is perfect by the mere consent of the parties; and the ownership of the objects given is transferred to the donee, without the necessity of any other delivery."

219. See *id.*

220. La. Civ. Code art. 1740 provides: "Every donation made in favor of marriage falls, if the marriage does not take place."

221. See *Glass v. Wiltz*, 551 So. 2d 32 (La. App. 4th Cir.), *writ denied*, 552 So. 2d 400 (La. 1989); *Daigle v. Fournet*, 141 So. 2d 406 (La. App. 4th Cir. 1962); *Ricketts v. Duble*, 177 So. 838 (La. App. Orl. 1938); *Wardlaw v. Conrad*, 137 So. 603 (La. App. 2d Cir. 1931); *Decuers v. Bourdet*, 10 La. App. 361, 120 So. 880 (La. App. Orl. 1929).

222. La. Civ. Code art. 1478, as amended by 1991 La. Acts No. 363, §1, provides: "A donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of fraud or duress."

223. La. Civ. Code art. 1953, as enacted by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides:

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other.

Fraud may also result from silence or inaction.

224. *Id.* Comment (b), Revision Comments - 1984 to La. Civ. Code art. 1953 states: "Under this Article, fraud may result not only from an act, such as a false assertion or suppression of the truth, but also from a failure to act, such as silence, that is calculated to produce a misleading effect."

225. La. Civ. Code art. 1959, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides:

Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property or reputation. Age, health, disposition and other personal circumstances of a party must be taken into account in determining reasonableness of the fear.

226. *Id.*

parties.²²⁷ Consent is also vitiated when the duress has not been exercised by the donee, but by a third party.²²⁸ However, a threat of doing a lawful act or a threat of exercising a right does not constitute duress.²²⁹ A spouse who challenges a donation because of fraud or duress must prove it by clear and convincing evidence.²³⁰ However, if a relationship of confidence existed between the donor and the donee at the time the donation was made, and the parties were not then related by blood, marriage, or adoption, only a preponderance of the evidence is required.²³¹

If an interspousal donation *inter vivos* is the product of error, is it a relative nullity? Louisiana Civil Code article 1948,²³² regulating conventional obligations or contracts, states generally that consent may be vitiated by error, fraud or duress. The articles following Article 1948²³³ contain specific rules amplifying when error, fraud, or duress do and do not vitiate consent. Article 1915²³⁴ provides that all contracts, nominate and innominate, are subject to the rules of Title IV of the Civil Code,²³⁵ which includes Article 1948. Article 1478, regulating donations alone, states that a donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of fraud or duress.²³⁶ It does not list error as a cause for

227. La. Civ. Code art. 1960, as enacted by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides: Duress vitiates consent also when the threatened injury is directed against the spouse, an ascendant, or descendant of the contracting party.

If the threatened injury is directed against other persons, the granting of relief is left to the discretion of the court.

228. La. Civ. Code art. 1961, as enacted by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides: "Consent is vitiated even when duress has been exerted by a third person."

229. La. Civ. Code art. 1962, as enacted by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides: A threat of doing a lawful act or a threat of exercising a right does not constitute duress.

A threat of doing an act that is lawful in appearance only may constitute duress.

Generally, the threat to institute criminal or civil proceedings to enforce what a person believes to be his legal right is not duress vitiating consent. *Storey v. Stanton*, 182 La. 873, 162 So. 649 (1935). But a threat to institute criminal proceedings of cruelty to a child, where there was no showing that the charges were justified, vitiated consent to adoption. *Wuertz v. Craig*, 458 So. 2d 1311 (La. 1984).

230. La. Civ. Code art. 1483, as enacted by 1991 La. Acts No. 363 §1, provides:

A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence. However, if, at the time the donation was made or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence.

231. *Id.*

232. La. Civ. Code art. 1948 as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, states: "Consent may be vitiated by error, fraud, or duress."

233. La. Civ. Code arts. 1949-63.

234. La. Civ. Code art. 1915, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides: "All contracts, nominate and innominate, are subject to the rules of this title."

235. Title IV, Conventional Obligations or Contracts, of Book III of the Louisiana Civil Code consists of articles 1906 through 2057.

236. La. Civ. Code art 1478, as amended by 1991 La. Acts No. 363, §1, provides: "A donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of fraud or duress."

nullity, as does Article 1948.²³⁷ Does it deliberately not include error?²³⁸ None of the other articles specifically governing donations provide that error may vitiate consent to donate. Article 1949 provides that error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.²³⁹ Error may concern a cause where it bears on the nature of the contract, or the thing that is the contractual object, or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstances that the parties regarded, or should in good faith have regarded, as a cause of the obligation.²⁴⁰ However, an error in a party's motive does not vitiate consent.²⁴¹ A husband,

237. La. Civ. Code art. 1948, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides: "Consent may be vitiated by error, fraud, or duress."

238. An intent to deliberately not include error as a cause vitiating consent in a donation *inter vivos* may be found in Comment (e), Revision Comments - 1991 to La. Civ. Code art. 1479, as amended by 1991 La. Acts No. 363, §1, which article provides that a donation *inter vivos* or *mortis causa* shall be declared null if it is the product of undue influence.

That comment states:

(e) Clearly, a court should distinguish between a willful deception by a donee or successor as to the character or contents of the instrument (or as to certain facts that are material to the disposition), and an innocent misrepresentation, which would not invalidate a gift or testamentary disposition. There is no intent to create a right to challenge donations based on mistake alone.

239. La. Civ. Code art. 1949, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides:

Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

240. La. Civ. Code art. 1950, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, provides:

Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

241. Comment (f), Revision Comments - 1984 to La. Civ. Code art. 1950 explains the difference between error bearing on one of the causes listed in article 1950 and error in a party's motive in entering into a contract:

(f) Under this Article, an error in a party's motive, that is, an error confined within the bounds of a party's subjectivity, does not invalidate consent. As expressed in *Capitant, De la cause des obligations* at 209-10 (1923): "Error makes the contract annulable when it concerns the act of will through which the party bound himself. Otherwise, that act of will being complete and nonvitiating preserves its obligatory effect. As a consequence, an error which does not affect the manifestation of will remains inoperative. That is the reason why an error in the motive does not annul the contract even though it exerts a decisive influence on the obligation. A party who buys a horse because he erroneously believes that his own has perished, or a donor whose will is determined by an erroneous motive, would not have contracted had he been correctly informed; nevertheless the sale or the donation are nonetheless valid. Although the motives rest in the subjective sphere of the individual, they no doubt prompt him to engage himself, but they nevertheless, remain beyond the contractual field, they are anterior to the act of will by which the party obligates himself; they are not a constitutive element of the act of will." *Capitant, supra*, at 209-10 (1923). See also 6 *Planiol et Ripert, Traité pratique de droit civil français* 222-224 (2d ed. Esmein

intending to make a manual gift of a zircon imitation of a diamond ring to his wife, mistakenly hands her another ring, a genuine diamond ring.²⁴² A wife, believing her husband to be a loving, faithful spouse, gives him an expensive Christmas gift, only to then discover that he had an affair just before Christmas.²⁴³ A husband erroneously believes that anything he donates to his wife will be community property; acting on this erroneous belief, he donates to her expensive property.²⁴⁴ There appears to be no policy reason why error concerning cause, as defined²⁴⁵ and restricted²⁴⁶ in the articles regulating conventional obligations or contracts, should not apply to donations *inter vivos*.

A donation may be revoked upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.²⁴⁷ This is a relatively new provision. It applies both to donations *inter vivos* and

1952); 1 Litvinoff, Obligations 394-96 (1969). That conclusion is consistent with the approach taken by the Louisiana jurisprudence. In *Tri-Parish Bank & Trust Co. v. Richard*, 280 So. 2d 850 (La. App. 3d Cir.), writ denied, 283 So. 2d 499 (La. 1973), where a payee did not know, and could not be presumed to have known, that the maker's motive for signing a promissory note had been to protect a corporation in which the maker owned an interest, the court concluded that even if such was the maker's principal motive, error as to that motive could not invalidate the note.

242. This error on the part of the husband is error as to the thing that is the contractual object of the donation *inter vivos*. If the husband intends to make a manual gift of a diamond ring to his wife, believing that the diamond is a zircon imitation, but it is in fact a genuine diamond, his error is one as to a substantial quality of the thing donated.

243. This error on the part of the wife is an error as to a quality of the other party to the donation, her husband. To vitiate consent, an error as to the quality of a thing that is the object of a contract must be an error as to "a substantial quality of that thing." However, an error as to the "qualities of the other party" to the contract is not similarly restricted to a "substantial quality." In the latter instance, "relief may be obtained when, intending to contract with...a person of a certain quality or character, a party has given his consent to a contract...with a person who lacks the intended quality or character." Comment (d), Revision Comments - 1984 to La. Civ. Code art. 1950, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985.

244. A distinction is observed between *ignorance* of the law and *error* of law. Ignorance of the law is inexcusable for laws that are in force. Ignorance of law is distinguished from error or mistake of law. Error of law may be a ground for relief when the law so provides. Comments (b) and (c), Revision Comments - 1987 to La. Civ. Code art. 5, as amended by 1987 La. Acts No. 124, §1, eff. Jan. 1, 1988, which provides that no one may avail himself of ignorance of the law. One of those instances when the law provides for relief based upon error as to the law is when a party has drawn erroneous conclusions of law and entered into a contract on the basis of them. Comment (e), Revision Comments to La. Civ. Code art. 1950, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985. Error of law is to be distinguished from ignorance of the law. The former may be excusable, the latter is not.

245. La. Civ. Code art. 1950, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, quoted *supra* note 240.

246. La. Civ. Code art. 1949, as amended by 1984 La. Acts No. 331, §1, eff. Jan. 1, 1985, quoted *supra* note 239.

247. La. Civ. Code art. 1479, as amended by 1991 La. Acts No. 363, §1, provides:

A donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.

donations *mortis causa*. To date, the cases interpreting and applying it have involved donations *mortis causa*.

The comments to Louisiana Civil Code article 1479 explain that the term "undue influence," which the article seeks to define, is a nebulous term, having any number of definitions in common law case law and jury instructions.²⁴⁸ It attempts to define the influence as being of such a nature that it destroys the free agency (free will) of the donor.²⁴⁹ It does not include the workings of the donor's own mind without pressure from someone else.²⁵⁰ The influence must be exerted by the donee or some third person although the donee may be ignorant of and takes no part in the activities of the third person.²⁵¹ Mere advice, persuasion, kindness or assistance should not constitute influence that would destroy the free agency of a donor and substitute someone else's volition for his own.²⁵² The influence must be exercised with the object of procuring a particular gift or bequest.²⁵³ The influence must be operative at the time of the execution of the *inter vivos* donation or testament.²⁵⁴ The word "volition" is not defined.²⁵⁵

A person who challenges a donation because of undue influence generally must prove it by clear and convincing evidence; however, in the situation when a relationship of confidence existed between the donor and donee at the time the donation was made, and the parties were not then related by blood, marriage, or adoption, only a preponderance of the evidence is required.²⁵⁶

In *Succession of Cole*²⁵⁷ undue influence was held not to have been asserted by the donee, with whom the testator, a disabled veteran, had lived for the last nineteen years of his life. The court held that while the donee, the testator's sister-in-law, may have exercised some influence over the testator, the evidence was "insufficient to prove that Donee's influence rose to the level contemplated by

248. Comment (b), Revision Comments - 1991 to La. Civ. Code art. 1479, as amended by 1991 La. Acts No. 363, §1.

249. *Id.*

250. *Id.* cmt. (c).

251. *Id.*

252. *Id.* cmt. (b).

253. *Id.* cmt. (c).

254. *Id.* cmt. (d).

255. Volition has been variously defined as the power or act of willing or choosing, the act of deciding, the exercise of will, or a state of decision or choice, Webster's Third New International Dictionary of the English Language, Unabridged 2562 (Miriam Webster, Inc. 1986), and as the act or faculty of willing, willpower, or the exercise of the will of a person. Funk and Wagnall's New Comprehensive International Dictionary of the English Language 1408 (1982).

256. La. Civ. Code art. 1483, as amended by 1991 La. Acts No. 363, §1, provides:

A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence. However, if, at the time the donation was made or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence.

257. 618 So. 2d 554 (La. App. 4th Cir. 1993).

[Louisiana Civil Code article] 1479—i.e. that she substituted her own volition for that of [the testator].”²⁵⁸

In *Succession of Braud*²⁵⁹ the court found no undue influence by the long time “sitter” of the decedent, who had made several wills in the last thirteen years of her life.

*Succession of Anderson*²⁶⁰ held that helpful suggestions from a family friend, an attorney, as to the form and contents of an olographic will, in which the attorney was not a legatee, did not constitute undue influence.

The most recent case is *Succession of Reeves*.²⁶¹ Mr. Reeves, an attorney, wrote a will leaving his second wife, Jarrett Ganey Reeves, approximately one-half of his estate and a lifetime usufruct on the interest of his ten children by a prior marriage in Elmly Planation. At the time of his second marriage, Mr. Reeves was 68 and his wife 38. Mr. Reeves met his second wife through one of his daughters, who was an acquaintance of hers. Shortly after his divorce from his first wife he started dating Jarrett. He was married to his second wife for eleven years when he executed the disputed testament. He died less than three months later. His children contested the will on the ground of undue influence. The trial court found undue influence by the second wife based upon Mr. Reeves’ “extreme” sexual dependence on his wife and his need for companionship and his fear of living alone.²⁶² The trial court relied upon common law jurisprudence listing four (4) elements as establishing a prima facie case of undue influence:

The elements that are set for [sic] in these common law cases have provided the court with substantial guidance in construing Article 1479 in the instant case.

“Most courts have listed four (4) elements as establishing a prima facie case of undue influence:

1. *Susceptibility* - a person who is susceptible of being unduly influenced by the person charged with exercising undue influence.

2. *Opportunity* - The opportunity of the alleged influencer to exercise such influence on the testator.

3. *Disposition* - a disposition - a disposition on the part of the alleged influencer to influence the testator for the purpose of procuring an improper favor either for himself or another.

4. *Coveted Result* - a result caused by, or the effect of, such undue influence.”²⁶³

After an extended review of the evidence and the four common law elements relied upon by the trial court, the appellate court reversed. With reference to the claims of undue influence arising from sexual dependency, need for companion-

258. *Id.* at 558.

259. 646 So. 2d 1168 (La. App. 4th Cir. 1994).

260. 656 So. 2d 42 (La. App. 2d Cir. 1995).

261. 704 So. 2d 252 (La. App. 3d Cir. 1997).

262. *Id.* at 258.

263. *Id.* at 257-58.

ship, and fear of being left alone, the appellate court announced the following public policy reasons for its decision:

We are told in the trial court's reason for judgment that the undue influence of the spouse was that she was able to exploit the decedent's sexual dependency and fear of abandonment because of his extreme need for love and sexual intercourse and additionally, his need for companionship and his fear of being alone. A moment's reflection suggests that love, companionship and intimacy are the primary reasons that people marry, *ergo*, the marital imperatives.

The court would note that had Mrs. Reeves been a paramour rather than a wife of eleven years, the court below might have been correct in finding that the need of the testator for love, companionship and sexual intimacy might have formed a basis for undue influence which might have been a solid ground for invalidating the will. In the case of a spouse, this is not so. The need for love, companionship and intimacy are among the foremost reasons for marriage. Each spouse owes these things reciprocally to one another. Either may and should expect love, intimacy and companionship and either might well be expected to be generous in making donations, either *mortis causa* or *inter vivos*, to the other.

In the case before us, we are told that because of his need for love, companionship and sexual intimacy, the testator left his property to the person who gave these things to him—his wife of eleven years. We are told that if he had not been willing to include her in the will, she might have withheld the love, intimacy and companionship upon which he was so dependent. Thus, her desire to be included in the will, coupled with her ever-present ability to withhold intimacy, constitutes a force strong enough to substitute her volition for his.

On public policy grounds, we decline to find these grounds adequate for reversing the stated will of the testator. Rather, we hold that the granting or withholding of love, companionship and intimacy are matters reserved to the good judgment of the member of the marriage unit; that either spouse is free at any time to ask for consideration on the part of the other, including the ability to ask for gifts, donations or inclusion in the will; and that ground rules for the granting or withholding of intimacy are best provided by the married couple rather than the civil courts. To be more specific, we hold that the granting or withholding of love, companionship and intimacy, *i.e.*, the marriage imperatives, are matters reserved to the married couple and shall not, standing alone, serve to invalidate a will.²⁶⁴

264. *Id.* at 259-60.

The Louisiana Supreme Court granted a Writ of Review,²⁶⁵ but the case was settled the day before oral argument.²⁶⁶ A definitive answer to what constitutes undue influence must await another day.

VI. MATRIMONIAL AGREEMENTS AND INTERSPOUSAL CONTRACTS

In *Boudreaux v. Boudreaux*²⁶⁷ the spouses lived under a legal regime of community of acquets and gains. While the wife's divorce suit was pending, they entered into a written agreement containing the following provisions, *inter alia*:

The wife could live in the family home as long as she remained single. If she remarried, the home would be sold and the proceeds divided equally. If the wife sued for divorce, she could live in the family home as long as she remained single, but if she remarried, the husband could live in the home upon paying the wife one-half of the value of the home.²⁶⁸

The "parties did not obtain judicial approval" of this agreement.²⁶⁹

Approximately four years later, the husband sued for divorce and asked the court to nullify the agreement.²⁷⁰ The court held that the agreement respecting the house was a matrimonial agreement that modified the matrimonial regime, and that it required "prior judicial approval."²⁷¹ Since this approval was not obtained, the court held the agreement to be invalid.²⁷²

The agreement was not a matrimonial agreement.²⁷³ A matrimonial agreement is defined by the object of the agreement.²⁷⁴ A matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating a legal regime.²⁷⁵ The word *regime* is a French word meaning a system of rules or

265. *Succession of Reeves*, No. 98-C-0581, 1999 WL 395384, at *1 (La. App. 2d Cir. 1999).

266. The writer was advised of this by Lawrence Sandoz, Jr., attorney for the second wife, Jarrett Reeves.

267. 745 So. 2d 61 (La. App. 3d Cir. 1999).

268. This is the writer's condensation of the provisions of the agreement affecting the family home.

269. *Boudreaux*, 745 So. 2d at 62.

270. *Id.*

271. *Id.* at 64.

272. *Id.*

273. In a previous law review article, the writer discussed the definition of a matrimonial agreement and distinguished it from an interspousal contract. See Kenneth Rigby, *The 1997 Spousal Support Act*, 58 La. L. Rev. 887, 937-39 nn.199-211 (1998).

274. See Rigby, *supra* note 273, at 938 n.205.

275. La. Civ. Code art. 2328 provides:

A matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating the legal regime. Spouses are free to establish by matrimonial agreement a regime of separation of property or modify the legal regime as provided by law. The provisions of the legal regime that have not been excluded or modified by agreement retain their force and effect.

The writer, in Rigby, *supra* note 273, at 937 n.199, pointed out that this codal definition of a matrimonial agreement is too narrow. Although the listed possible objects of a matrimonial agreement

regulations.²⁷⁶ A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons.²⁷⁷ A matrimonial regime may be legal, contractual, or partly legal and partly contractual.²⁷⁸ The legal regime is a particular system of principles and rules that govern the ownership and management of the property of spouses domiciled in Louisiana if they have not chosen another regime or modified the legal regime by contract.²⁷⁹ The parties may establish a regime of separation of property by a matrimonial agreement that excludes the legal regime of community of acquets and gains.²⁸⁰ They may also select a contractual regime or may modify the legal regime in part.²⁸¹

The basic characteristic that distinguishes a matrimonial agreement from other types of contracts entered into between spouses or between persons contemplating marriage is that the parties in a matrimonial agreement contract with reference to the *regime* (system of principles and rules) that will govern the ownership and management of their property during marriage.²⁸² The object of a matrimonial agreement is these governing principles and rules.²⁸³ If the agreement during marriage modifies or terminates an existing regime, the agreement is a matrimonial agreement requiring, with two exceptions, a judicial finding that the matrimonial

may be the most common ones, an agreement terminating a separation of property regime and establishing a contractual regime, or substituting any matrimonial regime for another type of matrimonial regime, or modifying any type of matrimonial regime, is a matrimonial agreement.

276. Black's Law Dictionary 1448 (4th ed. 1951). See also, La. Civ. Code art. 2325, cited *infra*, note 277.

277. La. Civ. Code art. 2325 provides: "A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons."

278. La. Civ. Code art. 2326 provides: "A matrimonial regime may be legal, contractual, or partly legal and partly contractual."

279. La. Civ. Code art. 2327 provides: "The legal regime is the community of acquets and gains established in Chapter 2 of this Title." Cmt. (a), Revision Comments - 1979 to La. Civ. Code art. 2327 states:

The legal matrimonial regime is the community of acquets and gains established in Title VI, Chapter 2 of the Louisiana Civil Code. Unless excluded by matrimonial agreement, the legal regime governs the ownership and management of the property of married persons as between themselves and third persons.

La. Civ. Code art. 2334 provides: "The legal regime of community of acquets and gains applies to spouses domiciled in this state, regardless of their domicile at the time of marriage or the place of celebration of the marriage."

280. La. Civ. Code art. 2370 provides: "A regime of separation of property is established by a matrimonial agreement that excludes the legal regime of community of acquets and gains or by a judgment decreeing separation of property."

281. See, La. Civ. Code art. 2328, cited *supra* note 275; La. Civ. Code Art. 2326, cited *supra* note 278; cmt. (d), revision comments—1979 to La. Civ. Code art. 2329, which states:

A matrimonial regime may be partly legal and partly contractual. This is the case when the spouses exclude, modify, or limit provisions of the legal regime of a community of acquets and gains. The provisions of the legal regime that have not been excluded, limited, or modified by contract retain their force and effect.

282. See Rigby, *supra* note 273, at 938 n.203.

283. *Id.* at 938 n.205.

agreement serves the best interest of the spouses and that they understand the governing principles and rules.²⁸⁴ If it does not, it is not a matrimonial agreement and does not require this judicial action for its validity.

Spouses have complete freedom to contract with each other, with few specified exceptions.²⁸⁵ The spouses are free to enter into a myriad of other contracts or agreements between themselves, which are not matrimonial agreements.²⁸⁶ For convenience, all these agreements between spouses that are not matrimonial agreements have been denominated as "interspousal contracts."²⁸⁷ These do not require any judicial action for their validity.²⁸⁸

In *Boudreaux*,²⁸⁹ the agreement with respect to the use of the community house and its disposition was clearly not a matrimonial agreement. It did not modify any of the existing principles and rules of the legal regime that existed between the spouses.²⁹⁰

The decision also implies that married persons may not conventionally partition community property unless they do so "in contemplation of a divorce."²⁹¹ Spouses are free to partition conventionally community property at any time,

284. La. Civ. Code art. 2329 provides:

Spouses may enter into a matrimonial agreement before or during marriage as to all matters that are not prohibited by public policy.

Spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules. They may, however, subject themselves to the legal regime by a matrimonial agreement at any time without court approval.

During the first year after moving into and acquiring a domicile in this state, spouses may enter into a matrimonial agreement without court approval.

285. Cmt. (a), Revision Comments - 1979 to La. Civ. Code art. 2329 states:

Spouses are free to contract with each other during marriage as to all matters that are not prohibited by public policy. For example, they may sell or lease property to each other; they may enter into a compromise agreement; they may even employ each other. The incapacities based on marital status, contained in Article 1790 of the 1870 Code, have been removed. See Acts 1979, No. 711, §1.

La. Civ. Code art. 2330 provides:

Spouses may not by agreement before or during marriage, renounce or alter the marital portion or the established order of succession. Nor may the spouse limit with respect to third persons the right that one spouse alone has under the legal regime to obligate the community or to alienate, encumber, or lease community property.

286. See Rigby, *supra* note 273, at 938 n.206.

287. *Id.* at 938 n.207.

288. *Id.* at 938-39 nn.208-09.

289. 745 So. 2d 61 (La. App. 3d Cir. 1999).

290. The majority opinion apparently invokes a distinction between a matrimonial agreement and an interspousal contract, i.e., whether the agreement deals with present or future property. However, the majority opinion misreads the distinction. The distinction is not whether the agreement deals with "the future use and sale of a (presently owned) community asset, the home," but whether the agreement deals with future property, i.e., property not presently owned but to be acquired in the future. *Id.* at 64.

291. *Id.*

whether or not a divorce is contemplated and whether or not the parties contemplate terminating the legal regime.²⁹²

292. La. Civ. Code art. 2336 provides:

Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially partitioned prior to the termination of the regime.

During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property. The partition is effective toward third persons when filed for registry in the manner provided by Article 2332.

Cmt. (a), Revision Comments - 1979 to La. Civ. Code art. 2336 states, in part:

The co-ownership of the community is subject to the rules governing termination of the regime rather than the general rules of the Civil Code governing judicial partition. The spouses may, without court approval, amicably partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property. But neither the spouses nor their creditors may force a judicial partition as long as the regime continues to exist.

See also Fargerson v. Fargerson, 593 So. 2d 454 (La. App. 2d Cir. 1992).

